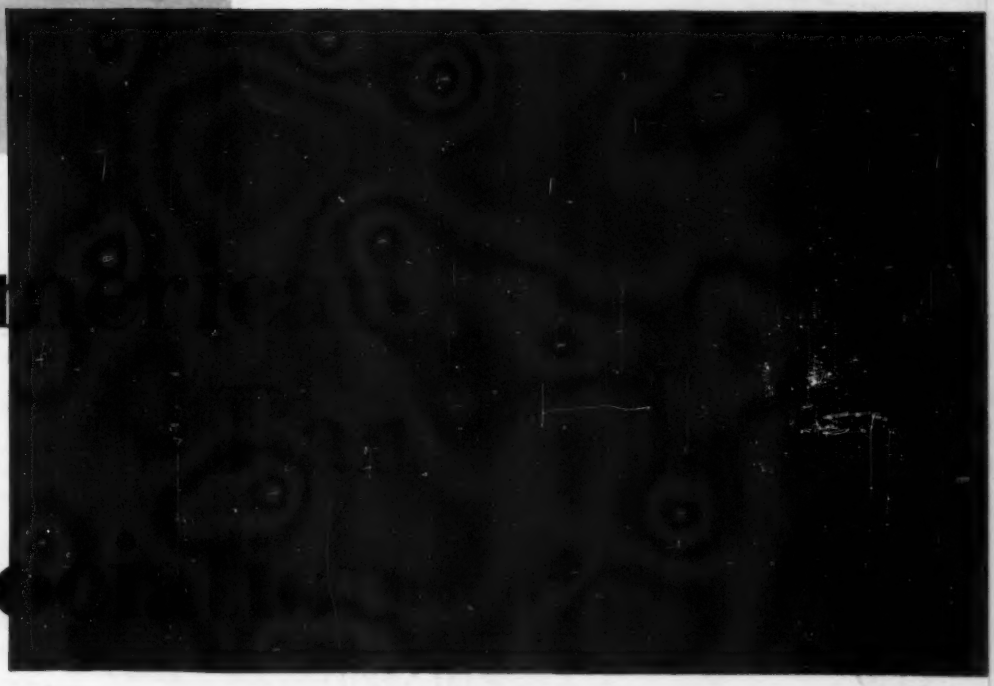
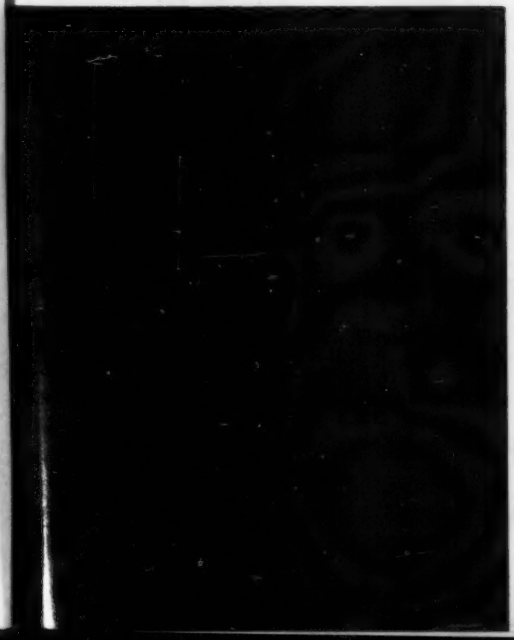
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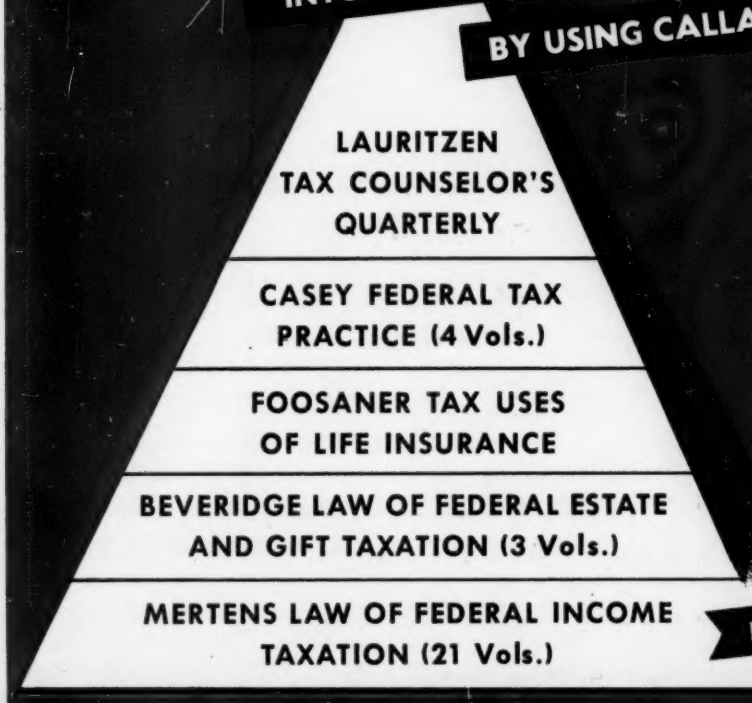


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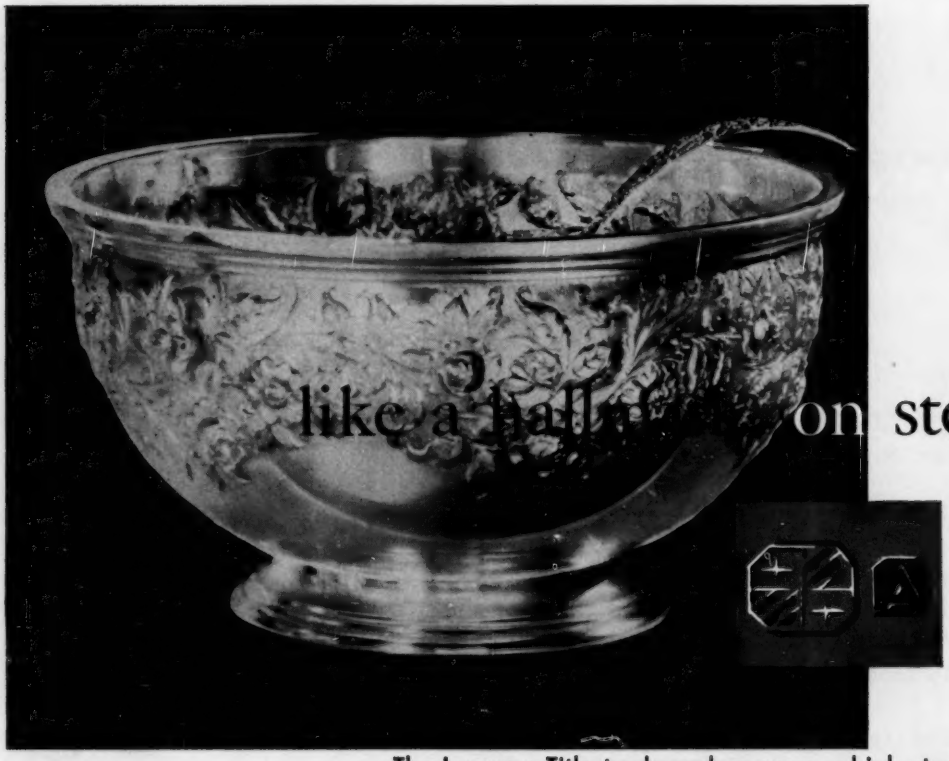
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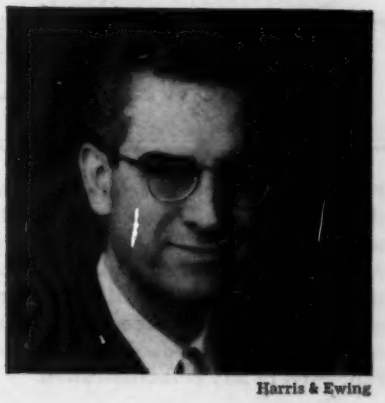
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The President's Page

Charles S. Rhyne



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Will the American Bar Association assume leadership in the celebration of "Law Day—U.S.A." on May 1, 1959? That question is being asked rather often these days.

The spectacular success of "Law Day—U.S.A." has brought a flood of recommendations from lawyers and laymen alike that this great commemoration in honor of the law be repeated next year. The Board of Governors and the House of Delegates must decide at their August meetings what the American Bar Association will do. It would be very helpful to have the views of the membership on both repeating "Law Day—U.S.A." and on the objectives and purposes which should be emphasized if it is repeated.

The over-all "Law Day—U.S.A." project was directed at the major goal of honoring and refurbishing our priceless heritage of freedom under law by focusing public attention upon what law has meant and can mean to our people. Three distinct objectives were encompassed: (1) contrasting our government under law with government under Communism by spotlighting "May Day" behind the Iron Curtain and "Law Day—U.S.A."; (2) recapturing and increasing respect for law in our nation to aid in eliminating the problems directly attributable to such cancerous maladies as juvenile delinquency and the traffic slaughter on our highways which flow in part from disrespect for the law; and (3) focusing public attention upon the rule of law as the only workable plan to both achieve and maintain world peace.

What is needed now are ideas, comments and suggestions from members of the American Bar Association on whether these are the three objectives which "Law Day—U.S.A." should emphasize if celebrated in 1959 or whether only one of these objectives, or some new and additional objectives should be stressed.

If, for example, Law Day next year is to emphasize the use of law to replace weapons in the settlement of disputes between nations, lawyers throughout the whole world might be asked to join American lawyers in an "International Law Day". This would require much planning and co-operation, perhaps through the International Bar Association.

The people of the world have never paused to really focus upon what law can do for them or upon the indisputable fact that expansion in the use of law can only mean progress toward peace. Expansion in the fields of science and technology can mean *both* better living and more terrible weapons of war, but *law expansion can only mean peace.*

Having thus planted the idea of peace under law on a world-wide basis, could we then move on before long to an "International Law Year" during which world attention would be centered constantly upon peace under law just as the scientists have thrown a world-wide spotlight upon science through their "International Geophysical Year"?

When one considers what the International Geophysical Year and this world attention have done for science, the idea of an "International Law Year" presents a tremendous potential. In addition to the man-made satellites and other spectacular achievements dedicated to the IGY, there have been 2300 scientific papers filed already for the second International Scientific Conference in Geneva this September. All over the world science has "come of age" in public recognition. Billions of dollars in government funds and thousands of students and scientists are constantly working for "breakthroughs" in science. The IGY has intensified and expanded world-wide interest and support for science. Could we not do the same for law, emphasizing that law can only mean peace?

Just think of what could be accomplished with a few thousand dollars and a few lawyers working for a "breakthrough" toward peace under law. There is no concentrated effort for such a "breakthrough" today as there was before the scientists split the atom or launched the satellites or before the doctors developed the polio and other vaccines. Could not the technique of such a "big push" be applied to the critical need for a practical plan to achieve and maintain peace under law?

The interest of lawyers and of the public at large in law, and especially in the possibility of use of the great principles of the rule of law to replace weapons as the mechanism for deciding disputes between nations, is at an all-time high. Should we not provide the leadership which only we can provide to translate this interest into a definite, guided program, with concrete goals and clearly charted steps of

(Continued on page 648)

Views of Our Readers

■ **Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.**

Some Reasons Against a Lawyer's Security Fund

I have read with interest the article by Reginald Heber Smith entitled "The Client's Security Fund: 'A Debt of Honor Owed by the Profession'" at page 125 in the February, 1958, issue of the JOURNAL.

I agree that the Bar is responsible for the character and conduct of its members, but I do not agree that the Bar should contribute to a security fund under the present conditions of our practice.

The practice of the Law Society of England cannot be compared with the activities of the Bar in America for the reason that the Law Society of England for more than 100 years has had the power to investigate the conduct of any attorney and discipline for unethical conduct. Without a control over the conduct of the members of the Bar, responsibility should not be assumed by the Bar for the delinquency of its members.

In 1930 I submitted to 300 lawyers in the State of New York with an av rating in Martindale's Law Directory a proposal to organize a bar association with power to discipline for unethical conduct. Thirty-two replied agreeing that something should be done, but there was no united agreement as to what should be done.

In 1936 I prepared a bill which was introduced in the New York State Legislature each year for five years to create a commission of five members, four lawyers and one layman, with the duty to investigate the conduct of any attorney and with power to discipline for unethical conduct. The bill was not reported out of committee.

Before considering the creation of a security fund, an agency for discipline should be created and organized on a sound basis, and each member of the Bar must come to an understanding of his duties and responsibilities towards his clients, the court and his fellow practitioners.

B. C. HARVEY

Mount Vernon, New York

Senator Hennings' Article Is "Superficial"

I have read with some skepticism the article in the March issue of the JOURNAL by Senator Hennings in which he states in his concluding paragraph that "... for its decisions of recent weeks the the Court should be praised for fulfilling its function as the ultimate guardian of human rights and freedom in our society". That this kind of generality rests upon a superficial analysis of recent decisions is evident from the Senator's brief article.

One thing which should be emphasized is that criticism of its decisions is not criticism of the Court itself. Those who denounce the Court as distinct from specific opinions make a serious mistake, as I believe do those who seek to change the basic structure of the Supreme Court or its role in our constitutional government by limiting its appellate jurisdiction. There can be no question but what the decisions involved (*Mallory, Jencks, Yates, Watkins, Sweezy, Konigsberg, Schware,* and *Steve Nelson*) have swung the pendulum of constitutional law off balance in favor of an unreasonable emphasis on so-called private rights, contrary to the right of society to a reasonable amount of protection under American law from the criminal and the subversive in America. No doubt there is much political appeal in being champion of any underdog. This is a recognized weakness of Senator Hennings' article in common with the rationale of several of the decisions in question. There are many who believe that by endorsing decisions supposedly in behalf of the individual against "oppression" by the state they earn the support of individual citizens. Such conclusions rest upon the assumption that the individual citizen in America is ill informed or hasn't the capacity to understand the danger in these decisions to his safety, his security and the future of his children.

The viewpoint expressed by Senator Hennings is clearly short-range. It rests upon superficial analysis. It raises the straw man that the Court is being criticized as well as that the procedures which have developed are unconstitutional and unlawful. It is interesting that nowhere does the Senator discuss the Court's interpretation of the Smith Act in *Yates* v. *United States* to permit the teaching or advocacy of overthrow or alteration of the Government of this country by force and violence so long as such teaching does not incite to the commission of an overt act in that direction; or *Pennsylvania* v. *Steve Nelson,* wherein the Court held that Congress by implication took from the states the power to make it a crime within the states to advocate or teach or aid or abet the overthrow of the Government of the United States—a concept both an affront to Congress and in palpable conflict with the Tenth Amendment.

Beyond doubt many of the recent decisions of the High Court represent exercises in the expression and justification of the personal, sociological or psychological viewpoint of authors of majority opinions. This makes poor law. It is contrary to the learning of many legal scholars relative to the importance of *stare decisis* and the general precept that legislation is for Congress and not for the judiciary. Recognition of such a fact is not disrespectful of the Court.

(Continued on page 608)

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The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

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Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

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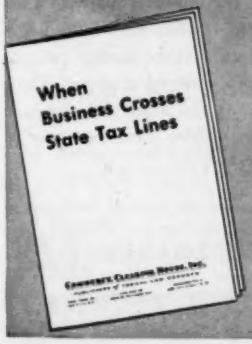
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It is the duty of lawyers for, practically speaking, only through the Court itself is a return to balance likely.

Much more could be said in establishing the harmfulness of these recent so-called civil liberties decisions. For the immediate present much of the harm can be undone by Congress at its current session by legislating simply to provide (1) S. 654—the Smith Act does not supersede state sedition laws; (2) clarification by increasing the detail of the resolutions governing the work and responsibility of the House Committee on Un-American Activities and the Senate Internal Security Subcommittee; (3) amending the Smith Act itself to include Communist Party recruitment within the definition of organization and to prohibit the teaching of or doctrinal presentation that it is all right to overthrow the government of state or nation by force and violence—just don't do anything about it for the moment.

LOUIS C. WYMAN
Concord, New Hampshire

The Fable of Plessy *v.* Ferguson?

Napoleon Bonaparte has been called cynical for saying that history is a fable agreed on; but it is observable that the most widely believed facts of American history are unsupported by evidence or demonstrably untrue. The difficulty of proving a negative makes it impossible to prove that George did not cut down the tree or that Pocahontas did not save the captain. The sworn testimony of eye witnesses does prove that Washington did not swear at Lee at Monmouth. A reading of the Emancipation Proclamation discloses that Lincoln did not, as is widely believed, free one or more slaves. (It was as if Eisenhower should proclaim that on and after July 4, 1959, there should be no forced labor in Siberian salt mines.) One of our most flourishing myths is that Justice Holmes once called wire-tapping dirty business. (In the wire-tapping case he called it dirty business for the Federal Government to reward its agents for violating state statutes.)

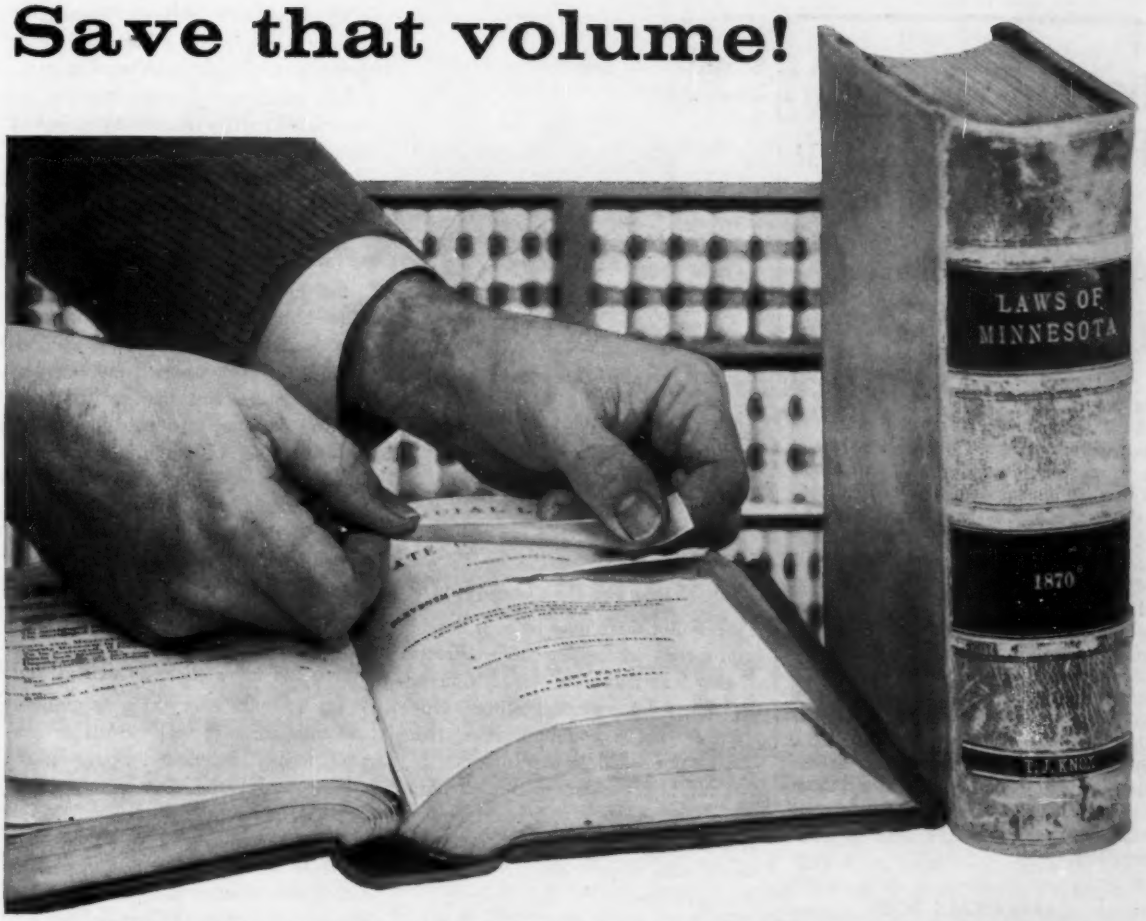
And now we are faced with the buildup of Mr. Justice Harlan as a prophet who opposed segregation in public schools. It would be a public service to strangle that myth in the cradle. It springs from the fact that in *Plessy* v. *Ferguson*, 163 U.S. 256, he coined the phrase "Our Constitution is color-blind..." (page 559). He was there dealing with a state statute that regulated a private corporation, a railroad corporation, and interfered with its freedom. Twelve years later in *Berea College* v. *Kentucky*, 211 U.S. 45, he was again dealing with a state statute that regulated a private corporation, an incorporated college. There the statute forbade this private school to accept colored students. That, he thought, was too much interference with private rights, because, as he said:

> The capacity to impart instruction to others is given by the Almighty for beneficent purposes. . . .

To keep posterity from claiming that

(Continued on page 610)

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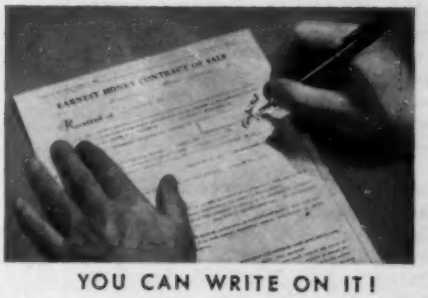


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(Continued from page 608)

he was against segregation in *public* schools, he added:

> Of course, what I have said has no reference to regulations prescribed for public schools, established at the pleasure of the state and maintained at the public expense. No such question is here presented and it need not be now discussed. My observations have reference to the case before the court, and only to the provision of the statute making it a crime for any person to impart harmless instruction to white and colored pupils together, at the same time, in the same private institution of learning.

RALPH T. CATTERELL

Richmond, Virginia

Lawyers' Writing Leaves Something To Be Desired

No doubt there may be considerable impropriety in the Executive Director of the American Bar Association addressing a letter to the editors which requests that a communication from him be published in the JOURNAL, but the attached communication contains comments which I feel our members would not only enjoy, but which they would also respect and, if I do not anticipate too much, also observe.

Having been in the practice of law for thirty years, I was interested in the reaction of the lay members of our staff to lawyers' habits of writing, etc., and the attached memorandum is the result of my request that they provide me with a frank expression of their views. I feel there is much food for thought for all of us in the comments which have been made and while some of them may be regarded as critical, I think all are constructive and suggest that perhaps we take ourselves too seriously even though we conscientiously recognize our professional and public obligations.

If you consider the enclosed worthy of publication, I shall be pleased to have you publish it, but I wish to make it clear that I shall not identify any of the members of our staff who contributed to the comments.

JOSEPH D. STECHER

American Bar Center
Chicago, Illinois

Mr. Stecher's enclosure reads as follows: Lawyers are a group of human species unto themselves. They eat, sleep, drink, walk, marry, raise families, go to cocktail parties like most people and seem perfectly normal in every respect. They even have a good time and on occasion display a keen sense of humor and are able to contribute to the general gayety and *esprit*.

But just let them take pen in hand. What happens? No matter whether it is an article for a magazine, a brief, or a letter they are writing, lawyers become grim, full of firm purpose, verbose, pedagogic, determined to follow no rules of rhetoric, grammar, punctuation, spelling or capitalization but their own. If a style book were to be written for lawyers it would be something like this:

Write as though no one knew the subject, or the English language, but you. Take it for granted that no one ever could know them as well as you.

Try to make everything as ambiguous as possible so that the reader cannot possibly understand what you are talking about the first time. If he doesn't understand you, he'll think you're smarter than he is.

Never write a simple sentence—it is too simple. Clutter it up with not less than two participial clauses and add a few parenthetical phrases for added thought and clarification. Explain one long sentence with another longer and more repetitious one.

Once you have mentioned John Jones or David Smith, always refer to them thereafter as "the party of the first part" and "the party of the second part". These references are so much more picturesque than mere names.

Always make sure that the subject of a sentence, is separated from the predicate by a comma—it helps to connect the thought.

A double subject connected by "and" always takes a singular verb (and vice versa).

Never end a sentence with a preposition. This is something up with which a lawyer should not put.

Never split an infinitive for fear it may not connect again.

Punctuate as much as possible,—use commas, etc., copiously, for example,

thus, they are for the purpose of pause, for breath.

Never, never use, "therefore", "however", "nevertheless", "none the less", "consequently", "thus", "but", or "hence", without a comma preceding and following. They would look naked standing alone.

When a comma is not appropriate, a semicolon is ideal; this helps to lengthen the sentence instead of ending it with a period; and, when you have used up all the commas, and semicolons, a sentence can take, there is always the colon: to stop the reader twice.

Capitalize as much as possible—for Emphasis. Take such words as "Judge" and "Justice", when not attached to a Proper Name, "Court", "Law", "Legislature, "Section", "Committee", "Act", "Government", "Federal", "National", "Company", "Trustee", "Will", "Lessor" and "Renter" — when capitalized, these Words add a Sense of Awe.

Italicize *frequently* for *emphasis*, because the words are *not strong* enough to express your *keen* emotions.

Everything must be emphasized, because *everything* you say is important.

Paragraphs were instituted to give particular emphasis when all else fails.

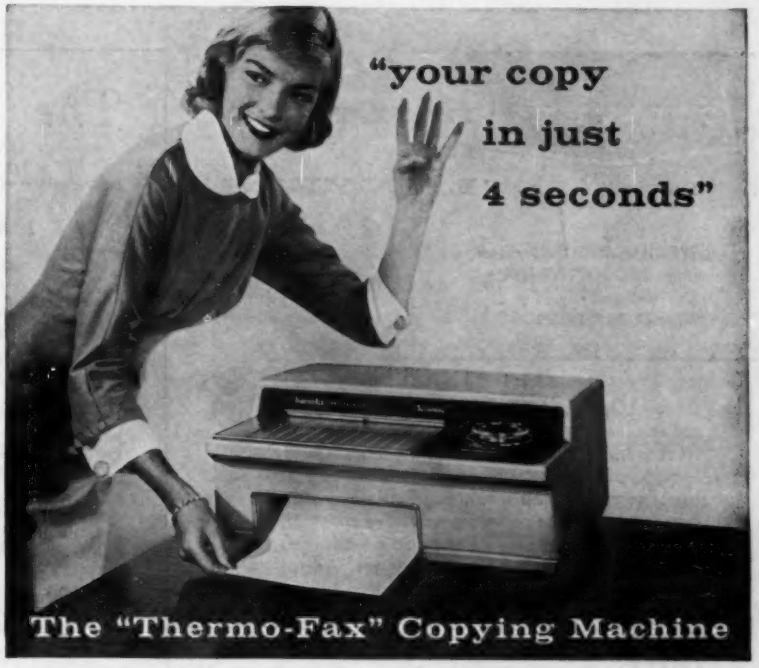
Therefore, make one-sentence paragraphs.

This method sets off sentences, regardless of the thought involved. (Of course, some lawyers prefer no paragraphs. This method sets off nothing).

Always write an article as though you were writing a brief. Outline your points by numbering them or the reader may lose track of them. Throw in a few Latin phrases to show your erudition—their meaning is unimportant.

Insist on placing all the titles and degrees you can after a man's name. It profoundly impresses the reader. And when referring to another lawyer always use "Esquire" instead of "Mr." —it boosts him a notch above his fellow men. If by chance "Esquire" is too lowly a title, try "Honorable"—it suggests an aura of distinction, even though no point of honor is involved.

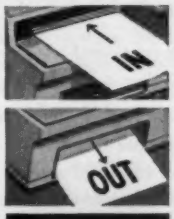
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more about it than you?) The way you wish your article published *is* the best way it can be done. If you have authority for your opinion, cite it; if you haven't, stick to it anyhow—no matter how much authority exists for the opposite viewpoint.

Conclusion

Always end your article with a heading "Conclusion" even though there is only one concluding sentence—the reader may not realize that you have come to the end.

What Lawyers' Wives Can Do for Legal Aid

It was with great pleasure that we read Judge Leon Thomas David's article, "Lawyers' Wives: Allies in the Work of the Organized Bar" which appeared in the February edition of the JOURNAL. We were impressed with the statistics concerning the activities of the Los Angeles ladies in providing services and funds to their local Legal Aid Society.

We believe it would be of interest to your readers to know what splendid work can be done in a moderate sized community as well as the large metropolitan area like our northern suburb, Los Angeles. Reference was made in the article to the work of the San Diego County Bar Auxiliary by stating that, "the lawyers' ladies are undertaking to staff some clerical operations in the Legal Aid office with volunteer services". To be more specific, our ladies have done all of the intake work during our three years of existence on the basis of six hours per day five days a week, for a total of 4,500 working hours. They have, by hand, completed 7,487 applications for Legal Aid service. In addition thereto, they have raised and donated to the Legal Aid Society more than $3,000 for necessary and vital equipment. When our recent United Fund Drive failed to reach its estimated goal it was again the ladies who came to our rescue with sufficient funds for salaries to continue our existence.

The exemplary volunteer work of the Women's Bar Auxiliary of San Diego drew national attention when, in 1956, the San Diego County Bar Association, in competition with the bar associations throughout the forty-eight states, won the first Harrison Tweed Award.

The greatest assets in our ladies have been the biblical virtues of "faith, hope and charity". They have displayed undying faith in the great public service performed by their husbands and in the principle upon which our Legal Aid Society is founded, "Thou shall not ration justice on a monetary basis". They have provided hope and encouragement to the bar association in its struggle to establish a workable Legal Aid program when many members of the Bar were discouraged and pessimistic about the success of such an endeavor. Their charity and kindness to those unfortunates who must seek the services of the Legal Aid Society have endeared these fine women to the heart of the community. Through the efforts of these gracious women our Bar Auxiliary has become our strongest public relations medium.

This faith, this hope, this charity, is



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a personal challenge to every member of the Bar throughout the nation to match these standards in his profession. To Judge David we say Amen and God bless our ladies.

ROBERT THORN

Legal Aid Society
San Diego, California

Going to Hawaii? Let Us Know Now

The Hawaii Committee on Arrangements for the Post-Meeting Visit have met and have outlined plans for the occasion. The first order of business is for us to be furnished with a list of the members who expect to attend. We should like to have this now even though it is incomplete and also we should like to be notified from time to time of additions and subtractions.

We plan a series of dinners in the homes of local lawyers for each visitor and his wife. This was effectively done by the Scottish Bar following the London meeting. In order that we may do this right we will need accurate information on the individuals who expect to attend. If possible, a biographical line giving their address, college and law school and the year of graduation.

J. GARNER ANTHONY
Chairman,
Committee on Arrangements
Bar Association of Hawaii

EDITOR'S NOTE: If you are planning to make the trip to Hawaii after the Los Angeles Meeting, send the information Mr. Garner requests to W. M. Moloney, Harvey R. Mason Travel Company, Inc., Professional Building, Old Orchard, Skokie, Illinois, who is handling arrangements for the Hawaiian tour.

Commissioners Aren't Uniform—It's the Laws

On page 573 of the June, 1958, issue of the AMERICAN BAR ASSOCIATION JOURNAL the members of the National Conference of Commissioners on Uniform State Laws are referred to as the "Uniform Commissioners".

May I respectfully point out that the Commissioners are by no means uniform. Some of them are short, some are tall, some are thin, some are plump, some are young, some are middle-aged, some are quiet, some are voluble—in fact, the only thing uniform about them is their devotion to the work of the Conference.

FRANCES D. JONES
Executive Secretary,
National Conference of
Commissioners on Uniform State Laws

A Judge —writes a Letter

An unsolicited letter recently received from a Judge of an Appellate Court includes the following:

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Professional Income:

Why Doctors Make More Money than Lawyers

by Lee Loevinger • *of the Minnesota Bar (Minneapolis)*

"Doctors make more money than lawyers because as a professional group they have established and maintained higher standards of competence and qualification," Mr. Loevinger writes. "Doctors are more rigorously selected, more thoroughly trained and educated, more highly specialized and more expert in dealing with the problems of their professional practice than lawyers, as a group." This article is a stimulating appraisal of professional income that will be of interest to every lawyer.

The income of medical doctors has become a subject of current jokes and fables—like that of Texans, who are said to be eligible for public relief if they net less than a hundred thousand dollars a year. Unfortunately lawyers are free from such jibes. If the mounting income of doctors is a subject of comedy, the trailing income of lawyers is a theme for tragedy, at least for many members of the profession. It is significant that the bar associations, in response to the demand of members, sought and secured the inclusion of lawyers within the social security system, while the doctors, at their own insistence, remain in affluent isolation outside the class of contributors and beneficiaries. It might be mentioned, too, that a sprightly publication called *Medical Economics* is commercially—and successfully—published to bring the medical profession news of economic significance to it, including a good many articles of the "how to invest" category. Apparently no one has ever been tempted even to try a similar venture for lawyers. A popular article which was widely reprinted a few years ago was entitled, "The Doctor and His Investments". The closest similarity that has yet been observed in the legal field is a seminar and article on the topic, "The Lawyer and His Client's Investments".

These things are, of course, mere symptoms, at the most, and trivia, at the least. But the facts support the inference to be drawn. Doctors make more money than lawyers—much, much more. Precise comparisons are always difficult to make unless there has been a carefully controlled investigation based upon identical sampling methods applied simultaneously to the relevant groups. No such investigation has been made of the medical and legal professions. However, it is not necessary that the data be statistically precise to the second decimal place in order to permit useful and legitimate comparison. Adequate and reliable surveys have been made of the two professional groups, and they support the conclusion stated.

Surveys of the incomes of lawyers and of doctors, based on large national samples of both groups, were published in the latter part of 1956. These showed that doctors had much larger net incomes than lawyers at every level of earning. At the bottom, while 9 per cent of all lawyers made less than $2,500 a year, the percentage of doctors making less than this was under 1 per cent. Only about a third of the lawyers made over $10,000 a year, according to the latest data, but nearly eight out of ten doctors received more than that. Less than 10 per cent of the lawyers earned more than $20,000 a year, but more than a third of all doctors made more than that. In the top bracket, less than 1 per cent of the lawyers got more than $50,000 a year, but 2 per cent of all doctors made that much. The statistical distribution for the two groups is shown in Table 1. The *median* income for all lawyers was $7,833, and for doctors was $16,071. In other words, the typical doctor has a net income more than twice as large as that of the typical lawyer!

What accounts for this disparity in the economic position of the two professions? Certainly there is no obvious answer. Both are engaged in rendering important and valuable services to the community, and both involve specialized training and a high order of professional skill. But despite the suggestion of many writers to the contrary, the social or spiritual value of services contributed to society is not necessarily related to the economic rewards secured. To demonstrate this one has

only to compare the salaries of movie stars and ministers, or of nurses and burlesque queens. To be sure, the practice of a profession (or of any occupation) may involve many rewards that are not monetary. But income is monetary and we are considering income. This is an economic problem, so it seems reasonable to examine economic facts and factors.

There have been several studies in the last few years of the economic position of the legal profession.[1] These have attempted to discover correlations between the income of lawyers, or groups of lawyers, and other data. However, the only correlations that seemed to have substantial statistical significance that have been observed have been:

1. Between lawyers' incomes and age or years in practice;

2. Between lawyers' incomes and business population; and

3. Between lawyers' incomes and size of law firm in which practice is conducted. Unfortunately none of these serves to distinguish the legal profession from the medical profession economically, as similar correlations exist among the doctors.

There is an impression current among some who have considered, but not investigated, the problem that the growth of medical insurance plans, such as Blue Shield and the various commercial policies, is responsible for the economic advantage that doctors have enjoyed over lawyers in recent years. Examination of the facts does not bear this out. The most recent investigation discloses that only about ten per cent of the average physician's gross earnings come from Blue Shield and other health insurance plans.[2] Further, this percentage has been declining in recent years while the doctor's economic lead over the lawyer has been increasing. In any event, this percentage is far too small to account for the great disparity in professional incomes of the groups.

Table 1

Net annual incomes equal to or more than:	Are received by this cumulative percentage of: Lawyers	Doctors
$50,000	0.9%	2%
$40,000	1.7%	4%
$30,000	3.5%	12%
$25,000	5.7%	21%
$20,000	9.6%	36%
$15,000	18.2%	57%
$12,500	25.0%	68%
$10,000	36.4%	79%
$ 7,500	52.9%	89%
$ 5,000	74.2%	96%
$ 2,500	91.0%	99%
LESS THAN $2,500	9%	1%
MEDIAN INCOMES	$7,833	$16,071

Sources: Lawyers' incomes are from, "Incomes of Lawyers in the Postwar Period" by M. Liebenberg, Department of Commerce Survey of Current Business, December, 1956. Doctor's incomes are from "How Much are Physicians Earning", *Medical Economics*, October, 1956. The percentages given for lawyers in certain of the income categories have been interpolated to match the categories used in the medical survey. Although the surveys were published at about the same time, the data for lawyers' incomes purport to be for 1954, and the data for doctors' incomes purport to be for 1955, so that the comparison is only approximate.

Economic Theory . . . Some Fundamentals

Since we are examining an economic problem it might be well to recall some of the fundamentals of economic theory. As every schoolboy knows, it is elementary that price varies in accordance with the relative supply and demand of a commodity and tends to approximate that level at which supply and demand will be equal. An increase in demand or decrease in supply tends to raise the price, and a decrease in demand or increase in supply to lower the price. For purposes of economic analysis, services are as much of a commodity as tangible goods.

It is easy to measure the price which is being paid for the commodities of legal and medical service. The incomes of doctors and lawyers obviously represent the economic price of their services. There is no available direct index of demand for such services. But there are figures indicating quite directly the supply of such services. Since both medicine and law are personal service professions in which the service that can be rendered is limited by the amount of time devoted to it, and most practitioners spend as much time as they can at their profession, the number of practitioners can be taken as a fairly accurate index of the available supply of such services.

We can, then, determine the relationships between the supply and price of medical and legal services over the years. Data showing numbers of doctors and lawyers are available from census figures and more recently from professional surveys. Comparable income figures for the two professions go back more than a quarter of a century. Examining these data we find that from 1910 to the present time the number of lawyers in the population has fairly steadily increased, both in actual numbers and in proportion to the total population. On the other hand, the number of doctors in proportion to the total population decreased from 1910 to 1940, and, despite the great military demands for medical services, has in-

1. *Income of Lawyers 1929-48*, U. S. Department of Commerce, Survey of Current Business, August, 1949; *Income of Lawyers in the Postwar Period, U. S. Department of Commerce*, Survey of Current Business, December, 1956; Arch M. Cantrall, *Economic Inventory of the Legal Profession*, 38 A.B.A.J. 196 (March, 1952); Robert M. Segal and John Fei, *The Economics of the Legal Profession*, 39 A.B.A.J. 110 (February, 1953) and 39 A.B.A.J. 216 (March, 1953); Robert M. Segal, *A Current Survey: Lawyers in the National Economy*, 42 A.B.A.J. 920 (October, 1956).

2. *Doctor's Income from Health Insurance Plans*, 33 Medical Economics 110 (November, 1956).

creased only slightly since 1940. Thus, for every hundred thousand of population there were 125 lawyers in 1910 and 146 in 1955. On the same basis, there were 164 doctors in 1910 and 132 in 1955. Insofar as data are available, it appears that during the same period the income position of the two professions has been reversed, with the lawyers changing from a profession receiving an average annual income amounting to 108 per cent as much as doctors (in 1930) to one earning 57 per cent as much as doctors (in 1955). Details and sources are shown in Table 2.

The inference from an examination of these statistics seems inescapable that the decline in relative supply of medical services has increased the price being paid for such services, and the increase in relative supply of legal services has decreased the relative price being paid for them. Perhaps there may be some who will quarrel with this conclusion. But the basic data are unimpeachable, and no other explanation for these long-term trends has been suggested.

This conclusion leads directly to another inquiry: Why has the relative number of doctors declined and stabilized while the relative number of lawyers in the population has increased? The answer to this question seems clearly to be that since 1910 the organized medical profession has raised and maintained the standards of ability and competence required for licensure to practice medicine, while the organized legal profession has lagged far behind in this matter.

Organized medicine began its efforts toward improvement of the standards of medical education and admission to the practice about 1910, and during the four succeeding decades over eighty sub-standard medical schools were forced out of existence.[3] By 1955-56 there were eighty-two medical schools approved by the American Medical Association, with a total of 28,639 students enrolled.[4] By comparison, according to the latest figures, there are 129 law schools approved by the American Bar Association, with a total of 39,949 students enrolled.[5] As might be expected from these figures, more students are being admitted to the practice of law each year than to the practice of medicine. In the years 1949-1952 there was an average of 13,400 students admitted to the practice of law each year.[6] During the same years the number of individuals admitted to the practice of medicine averaged 6,259 a year[7]—or less than half the number being added annually to the legal profession. Thus, while the legal profession has already far outstripped the medical profession in numbers, we are continuing to add new lawyers at about twice the annual rate that new doctors are being added to their profession.

3. *The American Medical Association: Power, Purpose and Politics in Organized Medicine*, 63 YALE L. J. 938, 970 (May, 1954).
4. 161 J.A.M.A. 1653 (August 25, 1956).
5. AMERICAN BAR NEWS, April 15, 1957, page 2.
6. Cunningham and Reed, GUIDE TO EARNING A LIVING (Simon & Schuster 1955) pages 17-18.
7. *Medical Licensure Statistics for 1955*, 161 J.A.M.A. 339, 357 (May 26, 1956).

Table 2
Statistical Comparison of Legal and Medical Professions

Year	Numbers of:— Lawyers		Doctors		average incomes of non-salaried—	
	Total	Per 100,000 population	Total	Per 100,000 population	Lawyers	Doctors
1910	114,704 (a)	125	151,132 (a)	164	X	X
1920	122,519 (a)	116	144,977 (a)	138	X	X
1930	160,605 (a)	131	153,803 (a)	125	$ 5,194 (b)	$ 4,870 (c)
1940	179,567 (a)	136	165,629 (a)	118	$ 4,507 (b)	$ 4,441 (c)
1950-51	212,605 (a)	141	191,947 (a)	127	$ 8,855 (d)	$15,262 (e)
1955	241,514 (f)	146	218,061 (g)	132	$10,258 (d)	$18,122 (h)

Notes: X indicates data are not available

Average income figures (arithmetic means) used as median figures are not available for the earlier years.

As indicated in Table 1, the discrepancy between the median incomes of the two groups is even greater than that indicated above.

The average income figures under the year 1955 are the latest available for each group. However, the comparison is only approximate as the average for the lawyers was based on 1954 data and that for the doctors on 1955 data.

Sources: (a) U. S. Census, Statistical Abstract of the United States for various years
(b) Income of Lawyers 1929-48, U. S. Department of Commerce, Survey of Current Business, August, 1949
(c) Income of Physicians, U. S. Department of Commerce, Survey of Current Business, July, 1951
(d) Income of Lawyers in the Postwar Period, U. S. Department of Commerce, Survey of Current Business, December, 1956
(e) Seventh Medical Economic Survey, *Medical Economics*, May, 1953, pages 117-125
(f) Lawyers in the United States: Distribution and Income, Part One: Distribution (American Bar Foundation, December, 1956)
(g) *Journal of American Medical Association*, May 26, 1956, 161:379
(h) How Much Are Physicians Earning? *Medical Economics*, October, 1956, pages 110-129



Lee Loevinger is a graduate of the University of Minnesota (B. A. *summa cum laude* 1933, LL.B. 1936) who has practiced in Minnesota since 1946. Before opening his office in Minneapolis, he was an attorney for the National Labor Relations Board and in the Antitrust Division of the Justice Department. He served three years in the Navy, leaving the service with the grade of lieutenant commander.

As might be expected, quantity is inversely related to quality. In other words, the smaller numbers of medical students, admissions and licentiates are closely related to higher standards prevailing for medical study and admission than have been established by the legal profession. Since January, 1953, the minimum requirement for admission to an approved medical school has been three years of college preparatory work. Furthermore, the Council on Medical Education of the American Medical Association "in accepting this minimum recommends for most students a full four-year college course in order that a broader background education may be obtained".[8] All states require four years of academic study in medical school for graduation, and one year of internship after medical school graduation is a prerequisite to licensure in the majority of states.[9] Beyond this, a doctor who wishes to qualify in one of the specialties (and this includes a substantial proportion of the profession) must ordinarily spend three additional years of study as a resident.

The standards for legal study and admission to the Bar are in sharp contrast. Five states permit one to enter law school with no special qualifications or only a high school education; thirty-seven states require two years of college work; two states require three years of college; and four states require four years of college or a bachelor's degree.[10] Thus in only six states of the United States are the prelaw requirements equal to the minimum premedical requirements of all the states. Beyond this, it is well known that the professional education given to medical students is far more thorough than that given to law students. Law schools uniformly require three years of study for graduation and qualification to take the bar examination, compared with the four years of medical school plus one year of internship. So far as practicing lawyers are concerned, there simply is no equivalent of the three-year specialty residence study of the medical profession.

It is difficult to strike meaningful averages as to such requirements, but one point is quite clear: In the great majority of states five years of college level study is required for admission to the Bar while eight years of such study is required for admission to practice medicine. In the legal field, the variations are largely toward lower standards, while in the medical field the variations are largely toward higher standards.

Higher Standards . . . An Ethical Problem?

Such facts still leave unanswered the issue that will occur to many lawyers, whether the higher standards of the medical profession are socially and ethically justified. The matter of professional and occupational licensure has been before the courts a number of times and it is well established that the purpose, and the only proper purpose, of professional licensure is the maintenance of standards of ability, competence, diligence and honesty for the protection of the public.[11] However, it follows that if occupational licensure is justified at all, it must find its justification in performing the function of insuring that the public is in fact protected by the maintenance of the highest standards that are practicable and compatible with an adequate supply of professional service. Obviously the higher and the stricter the standards are set for admission to a profession, the fewer will be the number of those able to qualify and the smaller the supply of professional service available to the public. Therefore, a reasonable balance must be struck between standards adequate to maintain a high level of professional competence and the necessity for permitting a sufficient number of persons to enter the profession each year to provide the services required by the public. However, if the function of licensure is to be fulfilled, if the public is in fact to be protected, then the balance must be one which not only allows the proper number to enter the profession and establishes tolerable minimum standards of competence, but also permits adequate economic status and incentive to those within the profession and to the able young men who are considering the choice of a profession.

These principles, although suggested by a study of recent statistics, are by no means novel or new. Much the same thing was said by the father of modern economic theory, Adam Smith, who wrote:

> The wages of labour vary according to the small or great trust which must be reposed in the workmen. The wages of goldsmiths and jewelers are everywhere superior to those of many other workmen, not only of equal, but of much superior ingenuity; on account of the precious materials with which they are entrusted.
>
> We trust our health to the physician; our fortune and sometimes our life to the lawyer and attorney. Such confidence could not safely be reposed in

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8. *Medical Licensure Statistics for 1955*, 161 J.A.M.A. 339, 359 (May 26, 1957).
9. *Id.*
10. Albert P. Blaustein and Charles O. Porter, THE AMERICAN LAWYER (University of Chicago 1954), page 210.
11. See *Smith* v. *Texas*, 233 U.S. 630 (1914); *Liggett* v. *Baldridge*, 278 U.S. 105 (1928); *Graves* v. *Minnesota*, 272 U.S. 425 (1926); *Delaware Optometric Assn.* v. *Sherwood* (Del. Sup. Ct., January 23, 1957) 25 U. S. LAW WEEK 2315.

Economic Aid and Foreign Trade:

How They Help To Protect Our Freedom

by **John Davis Lodge** • ***United States Ambassador to Spain***

Addressing the members of the Association who gathered in Atlanta last February for the Southern Regional Meeting, Ambassador Lodge spoke of the necessity of sacrifice if we are to win the Cold War against the Russians. He warned that our high standard of living will not protect us, citing examples of nations that have been defeated in the past by conquerors who had "no luxuries, few comforts and little culture".

One of the greatest legal minds of the ages, Justice Oliver Wendell Holmes, has written these luminous words about lawyers:

> But to those who believe with me that not the least godlike of man's activities is the large survey of causes, that to know is not less than to feel, I say—and I say no longer with any doubt—that a man may live greatly in the law as well as elsewhere; that there as well as elsewhere his thought may find its unity in an infinite perspective; that there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable.

And so we lawyers have a very special responsibility in this difficult and dangerous world. Lawyers are in a unique position to understand what it means to bring the public force to bear against the criminal, whether that criminal is an individual or a nation. This is not only the essential challenge to our generation, it is, of course, an age-old challenge, one which we shall have to meet in one way or another if we are to survive. We shall have to impose the necessary disciplines upon ourselves if our freedom is not to be crushed by disciplines imposed on us by others.

Under the leadership of our great President we are, of course, responding to this fateful challenge in many ways. Justice Holmes' famous dictum that "the foundation of jurisdiction is physical power", is helpful to a real understanding of the challenge. Physical power is, of course, expressed in many ways.

In his excellent address on the State of the Union, President Eisenhower has told us that we have, essentially, great military strength; that we are taking steps to equal and eventually to surpass Russian scientific achievements; and that our economic assets are more than equal to the task of meeting Soviet imperialist aggression on non-military fronts. The President has also made strong recommendations with respect to mutual economic assistance and international trade, recommendations which will, I hope, be endorsed by the Congress in order to provide these additional safeguards to our national security.

We must, of course, meet the Soviet threat on every front on which it presents itself. The Soviets have achieved their major conquests without war. Quite obviously, there is no present reason for them to go to war if they can reach their immediate objectives without it. We can, of course, avoid war by allowing them to add to their already vast colonial empire without the use of military power. This is a policy which we reject for it is defeat by default.

Just as the criminal may be deterred from committing a crime by the certain prediction that he will be severely punished if he does, so can we avoid war by convincing the Russians through our actions that the punishment which would be visited on them would be awful in its destructiveness. However, as long as the Soviets continue to resort to actions short of war in enslaving other people, we must, in our own interest, resort to actions short of war in blocking them and in our efforts to help peoples already enslaved. Soviet successes, except for the Hungarian tragedy, have so far been achieved not by military invasion but by subversion, external pressure, internal force, bribery, coercion and corruption. Even Hungary originally was subjected from within. Indeed Communism has never won in a free and fair election. The enslavement of some 600 million people has been achieved largely from within: the Trojan Horse technique; the Fifth Column taking advantage of the oppor-

tunities for incitement provided by free systems of Government and exploiting the weaknesses in these countries. We must learn to defeat the Russian Communists in this twilight zone of action.

In his State of the Union message the President said:

> But what makes the Soviet threat unique in history is its all-inclusiveness. Every human activity is pressed into service as a weapon of expansion. Trade, economic development, military power, arts, science, education, the whole world of ideas—all are harnessed to this same chariot of expansion.
>
> The Soviets are, in short, waging total cold war.
>
> The only answer to a regime that wages cold war is to wage total peace.

We must wage this total peace, then, by intelligent diplomacy in all its forms, by projecting truth both inside and outside the Iron Curtain; by basic scientific research and by a great revival in education; by military and economic aid; by loans and by foreign trade; and by every resource of the human spirit. We must exhaust every means at our disposal to checkmate our enemies in order to avoid the holocaust of total "hot" war. For wars are but extensions of peacetime conflicts. I am confident that we can use these means and at the same time keep our atomic deterrent powder dry. But it will not be easy.

Underlying our various efforts there must be a basic sense of unity. For, if the Western world is truly united, Soviet imperialism can make no headway and the Soviet empire will eventually crack and sway and finally crash from inanition. Our President has worked hard to achieve this unity by his presence at the NATO meeting in Paris and by many other means. The Secretary of State, too, has made great contributions. His visit to Spain, following the NATO meeting, has for example, been most useful in this connection. For although Spain is not a member of NATO, Spain is an Atlantic nation; Spain is the site of important bases; and Spain proved her anti-Communism some twenty years ago in a bloody civil war in which a million lives were lost. Indeed the Spanish people understand well what it means to fight and to experience the treachery of international Communism. The full co-operation of the noble people of Spain is vital to the unity of Western Europe. If we can forge real unity in western Europe, it will constitute a mighty force; it will place the Soviets on the defensive.

European Unity: An Old Challenge

The challenge of European unity goes back over many centuries. In a recently published and remarkable book, entitled, *Journey for Our Time*, the Marquis de Custine, writing in 1839, states that if the European nations do not learn to achieve unity, the Russians will be able to conquer them diplomatically and without even firing a shot. Unity, not uniformity, or even unanimity, is what we seek. We seek it not only abroad, but at home. Our dedicated President deserves and needs all our support in his efforts to protect America and lead the Western world in the cause of a durable peace. To us Americans this means sublimating private desire to the public good. It means placing the emphasis not on our differences but on the broad sweep of our common aspirations and interests. Let's turn off the heat and turn on the light. It means that in our contacts with each other and with our friends abroad we should stress the things which unite us rather than those which tend to divide us. Benjamin Franklin's famous exhortation, "We must all hang together, or assuredly we shall hang separately", is as valid today as it was when he uttered it.

I should like to stress particularly the economic field as a vital battleground. The United States, by far the world's greatest trading nation, is in a commanding position to determine the outcome of the economic struggle. Accordingly, the result of this titanic conflict may in great degree be determined by decisions that the Congress will make this year. On these decisions may well hinge, not only the fate of Western civilization, but our very survival as an independent people. The United States, standing alone, could not for long preserve either its prosperity or its free institutions. Indeed, ultimately we would succumb as a nation. We live increasingly in an interdependent world, a world in which political boundaries no longer coincide with economic frontiers. Indeed, our security and our prosperity depend upon the security, the stability and the unity of our allies. Their security and continued stability depend in turn in large measure on economic conditions. Their unity can hardly be achieved without American economic aid. To retreat to "Fortress America" a suggestion one still hears rather desperately offered, is to retreat from life. We can no more avoid the struggle of the marketplace than we can avoid the sweaty bull ring of politics, or the bloody arena of war if all other weapons fail. There are many reasons why we cannot go back to "Fortress America".

First, with the productive capacity of our friends harnessed to our common cause, we have an overwhelming advantage in industrial power over the Soviet empire. Conversely, this industrial power, in the predatory clutches of our enemies, would be more than enough to overwhelm us.

Second, the military bases which our allies share with us and the military forces they join with ours give us at present a strategic advantage for defense, thus greatly decreasing the cost of defense and the likelihood of war. These bases—these forces—in enemy hands, would vastly increase the cost of our defense and would immeasurably multiply both the hazards of war and the risks of defeat. To say that missiles and rockets would rob us of this advantage is merely to assert that we must, of course, not only keep pace but set the pace in this field as well as in others. There may, as we are well aware, be instances where conventional arms in a limited area will have to be resorted to.

This is not a time, and indeed, there has never been a time, when a great nation could safely rest on its laurels and say, "My work is done".

In addressing the Congress President Eisenhower said:

> In much the same way, we have tremendous potential resources on other non-military fronts to help in counter-

ing the Soviet threat; education, science, research, and, not least, the ideas and principles by which we live. And in all these cases the task ahead is to bring these resources more sharply to bear upon the new tasks of security and peace in a swiftly changing world.

Our economic power can in certain cases effectively prevent the Soviets from spreading the evil tentacles of despotism at the expense of our friends. We can use the economic weapon to impede the Russians in their attempt to colonize large areas of the world where we wish to see friendly nations prosper in peace and independence.

Moreover, it is vital that we maintain our access to raw materials and world markets. Without these, available investment capital would dry up; fear and doubt would replace confidence and faith, and the prosperity with which we support our defenses, as well as a full life, would disappear.

For the more industrialized nations prosperity and continued progress depend in great part on foreign trade. For the new nations in Asia and Africa, trade is vital to their development; indeed, to the very establishment of their nationhood.

Mr. Khrushchev, the First Secretary of the Communist Party, recently stated: "We declare war upon you ... in the peaceful field of trade. We declare a war we will win over the United States. The threat to the United States is not the ICBM but in the field of peaceful production. We are relentless in this and it will prove the superiority of our system." Just as Hitler warned us in *Mein Kampf*, so has Mr. Khrushchev warned us: "We will bury you", he said.

Mr. Khrushchev has shown that he understands the opportunities that exist in the field of development assistance and he has been busy in this area also.

What are the decisions to be made this year which will so vitally affect the outcome of this grim contest? One concerns the appropriation for the Mutual Security Program which involves military aid, defense support or economic aid, and development loans. Another concerns the bill to renew the Trade Agreements Program. These measures suffer from a common handicap. They are difficult to dramatize, particularly in an election year. The effects of aid and trade are important but they are gradual; they are indirect; they are not quickly and readily visible. Accordingly, it may be hard to mobilize public opinion on behalf of these valuable weapons. And yet, we must mobilize our total arsenal short of war. Let us, as our President has eloquently urged, wage total peace and use our predominant productive power. Let us also get some facts across to our alert citizenry. Let us point out that economic aid and foreign trade are not bountiful gestures from a generous people. We are a generous people, yes. There are programs which do come from the great heart of America and which are of enormous benefit to many millions of people who are not as fortunate as we. Yet, with all our natural wealth, our skills and our inventiveness, the United States must look outside its borders for many of its most essential needs, and, if our productivity is to be maintained, and our economy expanded, we must sell a portion of the goods we produce to non-Americans.

Over four and a half million wage earners, about 7 per cent of our entire labor force, owe their jobs to foreign trade.

In 1956, five per cent of our national income—17.2 billion dollars came from the sale of American goods to other countries. Imported materials are ten per cent of the total raw materials which the United States consumes, and many of them are of such vital importance to our economy that, for example, we have to import about 18 per cent of the iron ore we use to make steel, 88 per cent of the manganese and cobalt, 97 per cent of the nickel. In brief, we account for 20 per cent of the world's exports and 15 per cent of the world's imports. We are, indeed, the world's largest trading nation.

Our friends are, of course, just as dependent on trade and in many cases even more so. They cannot buy from us unless they can export. This is undeniable and it is vital. Without international trade in food there would be widespread hunger, despair, unrest, and political chaos, a fertile seed-bed of Communism. These are central truths. We of the non-Communist world must, therefore, work together. The common welfare depends in great part on international trade.

International Trade ... Another Weapon

Since 1954, the Soviet empire has concluded numerous trade agreements particularly in the Middle East and Africa. This trend is a threat to American national security. It is another weapon in world domination. Secretary of State Dulles has said:

> What is needed is a willingness of the free nations, first to moderate the unjustifiable trade barriers in cooperative agreements with one another and, second, to agree to handle in an orderly and equitable way the trade problems and controversies which inevitably arise between them.

Today many people live in appalling poverty. There is throughout the world a "revolution of rising expectations". Trade is essential for attaining these goals.

Because trade and economic aid lie in a sensitive zone there is a temptation to have two foreign policies. We want to defend ourselves with military power and by means of military alliances but, subconsciously perhaps, there is a desire in some quarters to retreat to "Fortress America" in our economic policies. This is not only contrary to our economic interests, it is fraught with danger. In order to achieve a more durable peace we must bring all our power to bear on a unified front. Military might is only a part of our total power. Moreover, two thirds of the Mutual Security budget, or 2½ billion dollars, is military. It helps our allies to bear the burden of the common defense.

We need all the friends we can get; and we must help our friends to sustain a share of the military burden in the struggle in which we are irrevocably joined. We must help equip their manpower not only for defense in the military sense, but also for industrial and other economic defenses. A much lesser amount, a modest amount relatively speaking, is devoted to economic development.

We do not seek to buy for these allied nations an industrialized economy overnight, nor do we seek to

purchase their friendship. What we do seek is to give them the bright hope of progress so that they can resist the somber menace of Communist oppression. We seek to give them technical assistance whereby specialists from other nations teach farmers, workers, businessmen, and government officials the best means to increase their own efficiency and productivity. We provide economic assistance whereby the United States, along with other governments and international agencies, makes funds available for the surveys and engineering and the basic improvements required to stimulate further development.

Funds for economic development are increasingly being made available on a loan rather than a gift basis. The Development Loan Fund was created last year to provide loans for economic development on more businesslike terms than in the past. The Fund (1) separates development efforts from other objectives, and (2) provides financing of long-term projects when funds are not available from other sources.

The 625 million dollar appropriation which the President has requested this year for the Development Loan Fund is minimal if Soviet efforts to penetrate the uncommitted nations of Asia and Africa are to be effectively and promptly countered and if we are to continue helping to build up the essential defense industries and facilities of our already committed allies.

If our friends abroad did not have the chance to trade, we should have to increase our Economic Aid Program to a tremendous extent in order to keep them strong enough to resist Communism. This would be a great additional burden on the American taxpaper, and it is doubtful if it could succeed.

In the past the United States has provided the leadership, releasing the power of initiative through a gradual, moderate reduction of tariffs on a reciprocal basis under the Trade Agreements Program. The President has asked the Congress to renew the program for five years, a period which, as the President put it in his message of January 30, "is necessary to carry the Trade Agreements program through the early formative period of the European Economic Community and strengthen our ability to further vital American interests there and elsewhere in the world."

In speaking of the need of protecting our own freedom through the Trade Agreements Program, I am very mindful indeed of protecting the livelihood of the workers and the owners of the businesses of America. The bill for the extension of the Trade Agreements Act contains all the safeguards for American industry contained in the present Act plus the authority to raise tariff rates somewhat higher to alleviate serious injury in certain exceptional cases. The President's authority in this respect provides safeguards against injuries and hardships which these measures might cause here at home.

Programs for the expansion of trade and for economic assistance are, as I have attempted to show, essential in defense terms alone. The benefits far more than justify the cost. But the strategic benefits are only the beginning of the total rewards to the American people of sound foreign economic policies. Broadened trade during the past year has provided steadily expanding markets for the manufacturers of our country and will continue to do so.

In the case of development assistance, a relatively modest loan of U. S. Government funds for engineering or basic projects can provide the "seed money" to release development funds from governments and international agencies, and may open the way for private participation in a development project. Development in turn provides expanding markets for American capital goods, and in the long run, as experience shows, it creates a net increase in outlets for the consumer goods we manufacture. Development also means more reliable, more economical sources of raw materials, and continuously widening opportunities for American private investment.

Thus, even if a program of broadened trade were not demanded for strategic reasons, it would be justified as a stimulus to American prosperity and progress. Accordingly, economic assistance which is essential to our defense will ultimately also produce important contributions to our economic growth.

In a recent forthright speech before the National Press Club, Secretary Dulles made this profound remark:

> It is up to us to make our freedom so rich, so dynamic, so self-disciplined that its values will be beyond dispute and its influence become so penetrating as to shorten the life expectancy of Communist imperialism.

Let us by all means place great reliance on our economic strength. Let us use it as a weapon short of war. But let us recognize also that our high standard of living is not a protection in a jungle world where unbridled passions are still on the march. Our creature comforts are not a shield in the struggle for survival. Indeed, they may well be a disadvantage. History produces many examples of the decline and fall of proud nations and their conquest by nations which had no luxuries, few comforts and, in some instances, little culture.

This is where our mettle will be tested. The choice is obvious but painful. It is the classical choice: guns or butter. We must show that we are more capable of sacrifice than the people for whom austerity may be both a necessity and a creed. We have more to sacrifice. They perhaps have only their lives to lose. We Americans have more to give up and therefore more to defend.

Alexander's Macedonians, Alaric's Goths, Attila's Huns, Genghis Khan's Mongols, George Washington's tattered volunteers! History contains many examples of the victory of austerity over material abundance. The Spaniards were lean and hungry in 1492. This helped them to discover, explore, colonize and settle large parts of the New World. It also gave them the motive power and the courage to oust the Arabs from their last stronghold in Spain — Granada — where the Moorish King and his court were living a life of Sybaritic ease in the palaces and patios, the fountains and the flower scented gardens of the Alhambra. The Christians did not die in the Colosseum

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The Duty of Judges:

A Government of Laws and Not of Men

by Judge Brockenbrough Lamb • *Judge of the Chancery Court (Richmond, Virginia)*

Addressing a recent meeting of the Virginia State Bar, Judge Lamb discussed one of the greatest problems that any judge must face: the danger that he will forget that he is "not a depositary of arbitrary power, but a judge under the sanction of law". Justice, Judge Lamb reminds us, must not be administered according to a judge's individual concept of right and justice, but only as justice is defined by the law. "Anything else is tyranny."

My subject is courtroom decorum, procedure and the problems of new judges.

Procedure may be disposed of in a word. Under any civilized system the primary essentials are notice and opportunity to be heard; reasonable notice in advance and an ample opportunity to speak. The soundness of the ideas expressed is not pertinent in this connection. A litigant is at liberty to assert untenable propositions and to speak nonsense. The same privilege of catharsis is accorded his attorney—and is frequently availed of.

It has been recently said of the English court procedure, which is our historical model, that the primary duty of a judge is to maintain an attitude that is amiable, detached and effortless. Upon catching a glimpse of the quarry, the most the judge should say is "Tallyho, the fox!" Reference to his ancestry and recommendation of extinction are to be avoided. We have Biblical authority warning against precipitate action; for it is said: "He that answereth a matter before he heareth it, it is folly and shame unto him."

It was an apparent departure from this Biblical injunction that occasioned Alice's surprise upon observing that the jurors were writing on their slates before the trial had begun. The explanation, you recall, was that each was writing his own name for fear he would forget it before the trial was over.

In the matter of decorum we may well emulate the example of the English judges and endeavor to be, or at least appear to be, unemotional, amiable, detached and effortless. The power reposed in a judge is so great that no emphasis in expression is needed. There is no need to employ italics in a decree. It seems after all that in the conduct of litigation the "how" and the "when" of the judge's participation are even more important than the "what".

Above all the judge should strive at all times to speak in language that is understood by lay litigants. I may go so far as to say that, if a choice is to be made, what we refer to as the language of the street is more appropriate from the Bench than words of art, interspersed with mispronounced Latin phrases.

The main objection to the wisecrack from the Bench is not so much because it is a breach of decorum as because it is unsportsmanlike. The judge has a captive audience, under compulsion to laugh at the slightest twitch of the strings—at any incident of the farmer's daughter, or even at the letter from the Siwash Indian.

And now a serious word. What I shall say is but recurrence to a fundamental principle, founded upon that truth which if known shall set us free. Upon adherence to this canon of judical conduct the vitality of our cherished liberties depends; for otherwise the doctrine of state sovereignty, right to trial by jury, freedom of speech and of religion—in short, all that we have hardly won and hold dear—become as sounding brass or a tinkling cymbal.

The greatest hazard a judge faces is not from without. The gravest danger, the most constant and appalling danger, lurks within the judge himself. It is what the judge would call his conscience, what others refer to as his preconceptions or his predilections—and what those who disagree with him denounce as his prejudices. By any of these dissimilar names it is the same identical thing. The difference is in the viewpoint.

I refer to what Chancellor Wythe had in mind when he said: "Compassion ought not to influence a judge, in

whom, acting officially, apathy is less a vice than sympathy". This expression from the pen of a great philosopher in the law is cited by the elder Burks in *Harris* v. *Harris*, 31 Grat. 32. In the course of his opinion in a heartrending case Judge Burks says:

> The unhappy condition of the appellee excites my commiseration; but courts of justice are not allowed to be controlled in their decisions by considerations of that character.

He then quotes Chancellor Wythe's eloquent words.

The crying need for this kind of judicial perspicacity and courage, in these times that are so badly out of joint, justifies the repetition of what should, in truth, be recognized as a platitude:

> We regret that the conclusion reached will prevent a recovery and may thereby defeat the ends of justice in the particular case before us, but however that may be, we must declare the law as we find it written and comfort ourselves with the confident belief that in its results it will promote the ends of justice to all.

The thought I am endeavoring to express is embodied in the Canons of Judicial Ethics (194 Va. clxii) in words that pull no punches. Quoting from Canon 20: We have a "government of law and not of men", and a judge "violates his duty as a minister of justice"—(strong language, is it not? It is not mine. It is quoted from the Canon)—"violates his duty as a minister of justice if he seeks to do what he may personally consider substantial justice in the particular case and disregards . . . the integrity of the system of the law itself." This canon cautions a judge to remember that he is "not a depositary of arbitrary power, but a judge under the sanction of law".

It would be well if the emphatic language of this Canon and the striking words of Chancellor Wythe were engraved over every Bench in the Commonwealth, and in other sections of the Union as well.

The inscription over the portal of the Supreme Court of the United States refers to that edifice as the temple of "justice under law". That inscription can but mean that there is, for a court or for a judge acting officially, no other justice than that defined by law. Unless the words mean this, they mean nothing. Since we have a government of law and not of men, there is no such thing for a judge acting officially as "justice", save only as it is found in and defined by the law.

The concept, now apparently prevalent, that the justice administered by the courts is a thing existing apart from the law, may have its roots in the ancient Latin maxim: "*Fiat justicia ruat coelum*"—let justice prevail though the heavens fall.

The translation of the Latin "*justicia*" into our modern "justice", considered as an ideal thing apart, is a mistranslation. "*Justicia*" to the Romans was their system of law, for the enactment and administration of which they had a gift that is not surpassed in recorded history.

And yet I apprehend, in view of current developments, that justice is all too often administered in accordance with the individual conceptions of judges of morality, psychology, sociology and ethics. Irrespective of the motive, whether good or bad, the result is tyranny; for the definition of a tyrant is one who is "unrestrained by law or constitution; a usurper of sovereignty". May we ever retain our capacity to detect it from afar "down every tainted breeze".

In view of the almost unlimited power reposed in a judge, acting officially, it would be well indeed for us to hark back to Chancellor Wythe and the elder Burks; to bear in mind that ours is a government of law and not of men; to place again the emphasis on the phrase "under law" when we speak of "justice under law"; to pay more than lip service to the vigorous assertion of a judge's official duty as plainly stated in Canon 20 of the Canons of Judicial Ethics, pronouncing for all that have ears to hear that a judge is not, in truth and in fact, a repository of arbitrary power but a judge under sanction of law.

The duty to which a judge may cleave in his official actions is owing by him to the integrity of the law—and to that alone. Every decision that is based upon the judge's individual concept of right and justice—every opinion that justifies a decision because it achieves the ends of justice under the special facts of the particular case—serves to weaken the foundations upon which our liberties rest.

The continued violation by us as judges of this fundamental principle will make our judiciary another Samson, blind to duty and swollen with power, pulling down the very pillars that support our most cherished institutions.

Make Your Hotel Reservations Now!

The Eighty-First Annual Meeting ot the American Bar Association will be held in Los Angeles, California, August 25-29, 1958.

Attention is called to the fact that many interesting and worthwhile events of the meeting will take place on Sunday, August 24, preceding the opening sessions of the Assembly and the House of Delegates on Monday, August 25.

Request for hotel reservations should be addressed to the Reservation Department, American Bar Association, 1155 East Sixtieth Street, Chicago 37, Illinois, and should be accompanied by payment of the $10.00 registration for **each lawyer** for whom a reservation is requested. This fee is NOT a deposit on hotel accommodations but is used to help defray expenses for services rendered in connection with the meeting.

Be sure to indicate three choices of hotels, type of accommodations desired and by whom you will be accompanied. We must also have a definite date of arrival as well as probable departure. Sleeping accommodations are still available as follows: Alexandria, Chancellor, Cloud Motel, Commodore, Hayward, Hollywood Plaza, Hollywood Roosevelt, Mayflower, New Clark, San Carlos, Savoy Plaza, Teris and Vine Lodge Motel (Hollywood). Reservations will be confirmed as promptly as possible.

A Case Note on Censorship:

Victor Hugo v. La Comédie Française

by **Eberhard P. Deutsch** • *of the Louisiana Bar (New Orleans)*

Le Roi S'Amuse **by the great French writer Victor Hugo is perhaps even better known in this country as the source of the libretto for Verdi's *Rigoletto*. The play aroused considerable controversy when it was first performed in the Paris of King Louis-Philippe and was banned. Mr. Deutsch tells the story of Hugo's battle for freedom of the press in this interesting article.**

Victor Hugo's *Le Roi S'Amuse* is probably best known as the story of the opera *Rigoletto*. The plot of the poetic drama, it will be recalled, revolves around Triboulet, the court jester of King Francis I.

The king is depicted as a handsome libertine, to the satisfaction of whose predatory pleasures the ladies of the court fall willing victims, to the despair of their noble husbands and fathers.

Triboulet mocks the courtiers while encouraging the king to engage in ever-new romantic adventures with their ladies. But he lavishes his own doting affection in secret on his lovely young daughter whom he keeps hidden under guard of an indulgent duenna.

The courtiers wreak their vengeance on the buffoon by inveigling him into unwitting assistance in the abduction of his own daughter and her delivery into the king's bedchamber.

On learning how he has been duped into becoming an accessory to the degradation of his cherished child, he curses the courtiers whom Hugo gave real names of the great families of Francis' court:[1]

> No, it cannot be that houses so great of such a race
> Could, under banners so proud, bear hearts so base;
> No, you do not pertain by right to families so fine,
> You were spawned by their lackeys on your mothers supine!

Descendants of these families held places of influence in the court of Louis Philippe when Hugo's drama was first performed by the Comédie Française on November 22, 1832.

Furious at Hugo's defamation of their illustrious names, they appealed to the Minister of Public Works, who immediately suspended performance of the drama and later issued the following decree:

> The Minister of State of the Department of Commerce and of Public Works, taking note, pursuant to article 14 of the decree of 9 June 1806, that numerous passages of the drama performed at the Théâtre Français the 22d November 1832, entitled *Le Roi S'Amuse*, are offensive to good morals, we have enjoined, and hereby do enjoin it. Performances of the drama entitled *Le Roi S'Amuse* are henceforth prohibited.
>
> Done at Paris, the 10th December 1832.
>
> COUNT D'ARGOUT

Victor Hugo at once filed suit against the Théâtre Français to compel it to resume production, averring that the Minister's order was an unconstitutional infringement of freedom of expression. The Theater pleaded the ministerial decree as *force majeure*, and brought a separate action against the Minister to set aside his order. The latter insisted that the Tribunal of Commerce had no jurisdiction over his official acts, and accordingly none over the proceeding.

The hearing on both actions, consolidated for trial, was fixed for December 19. Two days earlier, Hugo wrote to the publisher of the play "that it is important . . . that . . . the whole affair be well publicized. . . . Here are seven little memos . . . with the request that you use all of your influence to see that they appear tomorrow in the seven principal opposition newspapers".[2]

According to a contemporary report, the play had hardly attracted so large and interested a crowd as did the trial, including "select personnages and ladies in splendid attire . . . and well toward the rear, in the section in which the spectators must stand and which one might compare to the pit of our theaters, was crowded an impatient audience which had stood in line in the vast corridors of the Exchange since nine

1. Act III, Scene 3. Author's translation.
2. Julien, Adolphe, *Le Romantisme et l'éditeur Renduel*, REVUE DE DEUX MONDES, December 1, 1895, page 666.

in the morning, long before the opening of the doors" at noon.[3]

Behind these persons was a vast crowd in the vestibule, clamoring so noisily to get into the rear of the chamber, and cheering Victor Hugo so vociferously when he entered with his counsel, that when court finally convened, there was great difficulty in restoring order.

Maître Chaix-d'est Ange, advocate for the Minister, took the position "that the court must hold itself to be without jurisdiction to determine the validity or invalidity of an administrative act because, under the terms of the statute of 24 August 1792, the courts are prohibited from taking cognizance of administrative acts, or to intervene in administrative matters".

Me Barrot's Plea for M. Hugo

Maître Odilon Barrot, advocate for Victor Hugo, submitted that "by oral agreement of the 22d August past", the Théâtre Français "is obligated to perform the play, *Le Roi S'Amuse*, poetic drama in five acts, pursuant to the terms stipulated.

"Agreements are the law of the parties thereto", he continued, "and their terms cannot be changed by the courts."

"The Comédie Française must carry out its agreement even if it loses the subsidy granted by the budget to royal theaters.... Can it possibly be contended that one may refuse to carry out one's contract quoad a third person, on the pretext that the contract displeases a benefactor or a parent from whom one expects a legacy or fears disinherison?

"The renown of my client", said counsel, "renders it unnecessary for me to tell you who he is. [But] M. Victor Hugo is not only a poet; he is a citizen. He knows that there are rights ... which one may not abandon without surrendering the rights of others: the right of liberty of thought—of liberty of theatrical performance.

"I shall never forget, nor will France, that it was within this very enclosure, the 28th July 1830, that there was exhibited the first, the most solemn resistance to despotism: it was the memorable judgment which decreed that the printer Chantpie must comply with his agreement to print the *Journal of Commerce* despite the ordinances of 25th July.

"I foresee that I shall be answered by another case in which you rendered judgment in 1831 on the occasion of the prohibition by the authorities, of performance by the Théâtre de Nouveautés of the play entitled *Proceeding against a Marshal of France*.

"But, your judgment in that case can be distinguished from this. It declared merely that the director of that theater had done all in his power to continue to perform the play. He had yielded only to force of arms. His theater had been surrounded by gendarmes and had been kept closed for several days.

"We live, gentlemen", concluded the advocate, "in a strange era, an era of transition and confusion, because we live under four or five successive legislations of the empire which are contradictory of each other. Only the courts can pick out from this arsenal of laws those arms which may still be of service from among those whose use is no longer permitted. You will, I know, abide by the letter of the constitution which prohibits every kind of censorship, dramatic as well as of the press, and in doing justice to my client, you will serve the interests of liberty."

Maître Léon Duval, in behalf of the Théâtre Français, submitted that the "Comédie Française asked nothing better than to be permitted to continue to perform a work which promised substantial profits". But it "had submitted only to *force majeure*. This was not merely a matter of subsidy; the Théâtre could hardly be expected to engage in a battle in which it knows in advance it must ultimately succumb."

Victor Hugo himself thereupon stepped before the bar of the court to plead in his own behalf. "This cause, gentlemen," said he, "is not an ordinary one. It may seem to some at first blush that it is only a simple commercial action ... nothing more than the proceeding of an author against a theater.

"But gentlemen, it is more than that; it is a proceeding of a citizen against a government. At the heart of this matter, there is a play prohibited by decree. Now a play prohibited by decree is censorship, and the constitution abolishes censorship.

"You see, gentlemen, the extent to which the horizon of this cause is widened. The lesser facets of the proceeding disappear before the paramount issue thus raised.

"I am no longer simply a writer; you are no longer simply judges. Your conscience stands face to face across from my own. On that tribunal you represent an august concept—justice; before the bar of your court I represent another—liberty.

"Liberty of thought, gentlemen, by whatever means it may be expressed—whether in the theater or in the press, whether from the pulpit or on the rostrum—is the principal foundation stone of all of our freedoms.

"I am not speaking here with the genius of a lawyer, but only with the common sense of a citizen. ...

"In publishing *Le Roi S'Amuse*, I have declared boldly for all men of honor who desire to read my writings, that this drama is profoundly moral and sincere. ...

"Each of the four thousand copies of this book spread among the public has pleaded my cause; and these four thousand advocates have already won my case by demonstrating its inherent morality.

"The True Motive of the Censorship"

"Now, however, since the alleged immorality of this play has been made to vanish ... it becomes necessary to point out the true motive of the measure taken, the motive of the anteroom, the motive of the court. ...[4]

"It is only too true that there is in the third act of this play a verse in which the awkward wisdom of certain intimates of the palace has discovered an allusion of which neither the public nor the author had dreamed up to this time. ...

"It is only too true that this verse

3. The within report of the proceedings is adapted from the original account in the JOURNAL DES DEBATS of 20 December, 1832, revised only as necessary for condensation, with translation by the author.

4. André Maurois, in his LIFE OF VICTOR HUGO, says: "The real reason [for prohibiting performance of the play] was that the court could not stand seeing the monarchy, even that of Francis I, made fun of on the stage."

caused service on the Théâtre Français of the decree ordering its bewildered playbill no longer to display to the curious public, that seditious little phrase, *Le Roi S'Amuse.*

"We shall not here quote that verse, which is a red rag.... We shall not revive old historic scandals. We shall, so far as possible, seek to shield an exalted personnage from the consequences of this blunder of his courtiers. One may wage, even against a king, a generous war.

"Common knowledge has it, however, that on the day after the first performance of my play, several influential Deputies of the majority in power which votes the budget approached the Minister in the Chamber of Deputies, and obtained from him under all sorts of moral and political pretexts, a decree enjoining performance of *Le Roi S'Amuse.* The Minister, an ingenuous, innocent and frank gentleman, was boldly taken in.

"Gentlemen, the high personnages at interest have nothing to fear from me. I bear neither anger nor hatred.

"But in so far as there has been given to one of my verses a meaning which it does not have—one which I have never had in my mind—I declare this to be insolent—no less insolent for the king than for the poet.

"Your judgment in this cause, gentlemen, will demonstrate to the executive authority that the rights of every citizen are sacred to each Minister; that once the requirements of public order and security have been fulfilled, the theater must be respected as one of the voices with which the public conscience speaks; and that finally, be it the press, the tribune or the theater, none of these openings through which the liberty of the mind may emerge, may be closed without peril.

"The courts are the natural judges of such honorable duels of right against might; duels less unequal than one might think, because if there is on one side an entire government, and on the other only a simple citizen, the simple citizen is strong indeed when he may hale before your bar an illegal act ashamed thus to be exposed to the light of day, and so chastise it publicly before you as I have done with four articles of the Constitution.

"I say that the government takes from us, little by little, all of our rights and liberties which forty years of revolution have brought us; and I say that it is through the impartiality of the courts alone that this encroachment can be stopped along its fateful path, for the sake of the government as well as for us.

"Bonaparte, when he was consul and when he became emperor, also sought to establish a despotism. But he went about it differently. He entered openly by the front door. Napoleon took in all of creation with a single sweep of his hand. The lion does not employ the methods of the fox.

"The France of that era had, like Rome under Caesar, an attitude at once submissive and superb. That was France enslaved by a man—but mistress of the world.

"Napoleon ruled the destinies of French actors arbitrarily, but he dated his decrees at Moscow.... He had a bureau of censorship . . . he defaced the posters of our plays. But he could respond magnificently to all of our complaints with a single word: Marengo! Jena! Austerlitz!

"Today I am required to take my poetic freedom through a censor; tomorrow I shall have to take my liberty as a citizen through a gendarme. Today I am banished from the theater, tomorrow I shall be banished from the land. Today I am gagged, tomorrow I shall be deported. Today martial law has been declared over literature, tomorrow it will cover the city.

"We shall before long have all of the despotism of 1807 without any of the glory. We shall have the empire without the emperor.

"There has been only one great man in this century: Napoleon; and only one great concept: freedom. We no longer have the great man. Let us strive to preserve the great concept."

Hugo's address is reported to have evoked effusive applause from the back of the chamber, as well as from those standing outside who had been unable to gain entry; whereupon the President of the court, M. Aube, stated sternly: "A part of the public seem to forget that they are not at a play."

Maître Chaix-d'est Ange, advocate for the Minister, thereupon took up the plea for the defense. "Gentlemen," he said, "two questions have been presented in this proceeding: I shall discuss the first, that of jurisdiction, in some detail; but I shall pretermit discussion of the second, that as to substantive validity of the Minister's act.

"Since you are without competence, I need not examine before the consular jurisdiction whether the administrative act is legal or must be declared invalid.

"There are principles which, in all argumentation, it suffices to state, and which may never be contradicted. Thus ... the experience of all times has consecrated, to such an extent that it may never be assailed, the principle of the division of powers in all well-regulated government.

"There is the legislative power, that which makes the laws; the judicial power which applies them; and the executive power which watches over their execution and to which the ad-



Eberhard P. Deutsch has been practicing in New Orleans since 1925. He received his legal education at Tulane and is a member of the Association's Committee on Peace and Law Through the United Nations.

ministration is confided.

"My opponent has cited to you, first, a judgment rendered by this court in the matter pertaining to the play, *The Case of Marshal Ney*. The court not only sustained dismissal of the claim on the ground of *force majeure* resulting from the intervention of the gendarmes; it clearly recognized its lack of commercial jurisdiction over an executive act.

"Indeed, in that case as in this, one could discern some sort of collusion between the authors and the theater to put the Minister on trial.

"My opponents have also invoked the judgment rendered 28 July 1830 in the matter of Chantpie, publisher of the *Journal of Commerce*. That was a judgment rendered in the midst of combat and of peril—a judgment pronounced by this very tribunal in decreeing the illegality of the ordinances of 25 July.

"That was, in fact, a great act of courage, an act of good citizens; but is it necessary, in moments of calm, to cite that which happened in times of disorder?[5]

"The judges who rendered that decision were like the national guard which, also illegally, put on their uniforms and went out to do battle for liberty and for law.

"But M. Victor Hugo has an obsession; he believes that the people are ready, as heretofore in the case of the ordinances of July, to create a riot or even a revolution to set aside the order which prohibited performance of his play. The author has said this himself in a letter addressed by him to the newspapers.[6]

"It would not be the desire, nor within the power of the government, to enjoin performance of a play which contained no threat to peace or good morals.

"Let M. Victor Hugo write a masterpiece—and he has ample talent to do it—let him speak of the blessings of liberty as he has heretofore spoken of the benefits of the Restoration. He will be heard, and if he should encounter obstacles, justice will be done for him."

Maître Odilon Barrot replied at once in behalf of Hugo, pointing again to precedents in which administrative acts had been held by the courts to be illegal. Such was the principle, he said, underlying the decree of the Court of Cassation in the matter of the ordinance of the police which prohibited bill-posting on houses during the processions of Corpus Christi.

"There can be no doubt, gentlemen", said counsel, "that as a citizen and as an individual, one has the right to resist such acts of oppression; but when we are re-vested with the toga, when we exercise a public function, when we are appointed to enforce respect for the laws, we do not violate them.

"No, gentlemen, this court did not violate the laws at all in the matter of Chantpie; and its glory is so much the brighter for its resistance to despotism within the limits of its duties."

There was a further interchange between Victor Hugo and counsel for the Minister as to a discussion between Hugo and the Minister before the performance of the play, in which, Hugo stated, he had threatened to withdraw his play from the boards if, as had been rumored, the Minister intended to censor it; but that the Minister had given his assurance that he had no such intention.

Finally at 5:45 P.M. the court took the matter under advisement, and the hearing was adjourned. The crowd which jammed the aisles and corridors, waited for Hugo to pass and cheered him vociferously.

On January 2, 1833, the court entered judgment holding itself to be without jurisdiction over the cause; and Victor Hugo announced that he was waiving his right to appeal because, in light of the temper of the times, he saw no hope of a judicial decree invalidating the act of the Minister.

Seventeen years later, Hugo's drama impressed Giuseppe Verdi as ideally suited for operatic treatment; but it was feared that, in light of the suppression of the play, the title, *Le Roi S'Amuse*, was politically too suggestive, and when the opera was first written, its title was changed to *La Maledizione*.

Later, the political situation in Europe was still such that it was deemed injudicious to endeavor to present publicly a story of royal debauchery and decadence.

The locale of the opera was accordingly changed from the court of Francis I to the palace of the Duke of Mantua, a petty North Italian nobleman. It was retitled *Rigoletto*, and had its eminently successful debut in Venice on March 11, 1851.

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5. Compare the argument of Jeremiah Black before the Supreme Court of the United States in *Ex parte Milligan*, 71 U. S. (4 Wall.) 2, 75-76 (1866): "In peaceable and quiet times, our legal rights are in little danger of being overborne; but when the wave of power lashes itself to violence and rage, and goes surging up against the barriers which were made to confine it, then we need the whole strength of an unbroken constitution to save us from destruction."

6. In a preface to an edition of his play dated November 30, 1832, Hugo states: "I had two ways to obtain justice—public opinion and the courts. I chose both."

Committee on Law Lists

On May 29, 1958, the Standing Committee on Law Lists issued a Certificate of Compliance for the U. S. Section of the 1958 Edition of CARSWELL'S DIRECTORY OF CANADIAN LAWYERS, published by the Carswell Company Limited, 145-149 Adelaide Street West, Toronto 1, Canada.

Government in Britain and America:

Two Different Constitutional Systems

by Sir Edwin Herbert, K.B.E.

One of the reasons for the misunderstandings that sometimes mar British-American relations, Sir Edwin declares, is that the British Government and the United States Government are superficially similar while in reality they are quite different. When a member of the British Cabinet makes a statement, for example, it is understood that he has conferred with the other members of the Government and that he speaks for all of them. Accordingly, when an American Cabinet officer makes an address or testifies before a congressional committee, Britons assume that he is speaking for the United States Government and they may easily be irritated at what appears to them to be the position of our Government. Sir Edwin's article is taken from an address delivered before the American Chamber of Commerce Luncheon during the Association's visit to London last year.

I must first of all thank you for giving me this opportunity to address so distinguished a company, amongst whom I am delighted to see a number of my fellow members of the American Bar Association. I fear that the quality of what I have to say will not match the quality of my audience. I shall begin by telling you some of the things that I am not going to say. I am not going to tell you about the American lawyer who consulted me confidentially as to whether it would be safe to come here. He seemed to think that he might be attacked in the Strand by someone who felt annoyed by some remark or other of a member of your Government. I am not going to tell you about the lady who recently paid a large sum for excess air baggage because of the case of soap she was bringing with her. I am not going to tell you about my young friend from Oklahoma who enquired tactfully about the possibility of obtaining hotel rooms outside London and who, under cross-examination, admitted that what he had in mind was bugs. These minor misunderstandings merely add to the gaiety of nations.

I promise you also that I shall avoid certain well worn clichés. I shall say nothing about blood being thicker than water. I shall say nothing of our common inheritance under the common law. I shall make no reference to the Bible or Shakespeare, and I shall say nothing about our allegedly common language. All these things are true and important, but you have heard them all before.

I know that you are all interested in the preservation of good relations between our two countries and our two peoples and I know that you are interested in fostering trade between us. Many of the common misunderstandings can only be overcome by personal experience. May I say here that we have been delighted to welcome so many of your countrymen to this country and that we do so for their own sake and not merely for the supposed benefit they do to our economy. Nothing has given me greater personal pleasure in the last few weeks than the inclusion of dollars in the currency for which foreign travel allowances may be obtained by British citizens. I hope that this will enable many more of my countrymen to go to your country and there learn for themselves the warmth, kindness and generosity of the welcome that awaits them and which I have so often enjoyed.

Nevertheless, one cannot hope that more than a small proportion of your population can visit us, or that more than a small proportion of our population can visit you. For the most part, we have to rely upon the printed word and mainly the newspapers for the pictures we form of each other's countries and each other's ways of life. I never cease to marvel at the skill of the press in presenting day by day accurate and reliable news. I listen with wonder to the radio commentators who succeed in compressing so much into so small a space of time. But nonetheless our understanding of the news, however well presented, and our evaluation of it depend on our understanding of the background against which the news is presented.

I want therefore today, if you will permit me, to deal with what seem to

me to be three major misunderstandings which often do, and especially perhaps during the past months often have, impaired our relationships. I refer firstly to our misunderstandings of the nature of statements made from time to time by members of the United States Government. Secondly I wish to refer to misunderstandings as to the nature and conduct of proceedings before Committees of the Senate and the House of Representatives. Thirdly I wish to refer to misunderstandings as to the way in which tariff policies are formed in the United States, this last being of particular interest to men of business.

These three major misunderstandings are in my humble judgment all the more dangerous because their nature, and indeed their very existence, is insufficiently understood and recognized. They all flow from an underlying misunderstanding of the nature and working of the Constitution of the United States and the nature and working of the British Constitution.

The picture in the mind of the ordinary Englishman of the nature and working of the United States Constitution is a remarkable work of naïve imagination. The ordinary Englishman says to himself "We have a Parliament which is the equivalent of your Congress. We have a House of Commons which is the same thing as your House of Representatives. We have a House of Lords which corresponds to your Senate. We have the judicial capacity of the House of Lords which is the analogue of your Supreme Court. We have a Prime Minister whose opposite number is your President. We have a Cabinet and so have you, and the two things are much the same. Your Republican Party is something like our Conservative Party and your Democratic Party is something like our parties of the left." These analogies are alive in the public mind but they are grotesquely inadequate and misleading. So far from the Constitution of the United States and its working being similar to the British Constitution and its working, the opposite is true.

We must never forget that the United States Constitution, so far from being like the British Constitution, was meant to be as different as possible. Insofar as it had a model, that model was French not British. The French model was of course modified by practical exigencies arising from the fact that the founding fathers discovered the states to be as intractable as we had found them to be as colonies only a few years before.

We must bear in mind that the United States Constitution had three main objectives that are relevant to our discussion today. In the first place the Federal Government was made as weak as could be devised without ceasing to be a government at all, with the Supreme Court expressly created to disallow any excess as unconstitutional. In the second place we have to notice the rigid demarcation of the legislative, executive and judicial functions of the state. Thirdly we must remember that the framers of the Constitution assumed that there would be no foreign entanglements for the United States and therefore made no provision for formulating a national foreign policy. There is only the negative provision requiring a two-thirds majority of the Senate for the validation of a treaty. We must not be surprised to find that Constitutions so different in outlook and intention give rise to striking differences in their working.

The British System . . . Parliamentary Government

Let us look first at Great Britain and then at the United States. In Great Britain, the political cycle begins with a general election. At the general election by direct vote of the populace a party with a particular outlook and policy is given a majority and placed in power. The leader of the majority party becomes Prime Minister. The Prime Minister then proceeds to select his Ministry, some of whom are of Cabinet rank and some of non-Cabinet rank. All Ministers whether of Cabinet rank or of non-Cabinet rank must be members of the House of Commons or the House of Lords. The Prime Minister and his party remain in power only so long as he and they can retain a majority in the House of Commons. It was not mere rhetoric, but a statement of plain constitutional fact that was being asserted when, during the war, Winston Churchill used to say "I am the servant of the House". The fact that for most of the time he was also the master of the House does not alter the position.

It follows from this that Ministers have constantly to be available in the House of Commons there to answer not only for policy but for the day-to-day administration of their Departments. There are of course debates on special occasions when the full strength of the Government bench is ranged against the serried ranks of the Opposition. But every day immediately after prayers, come parliamentary questions when any member can ask any Minister any question however deeply probing about the work of his Department. If the Member who has asked the question is not satisfied, and the Speaker rules that the matter is one of urgent public importance, the matter can be debated on the adjournment of the House.

If the Prime Minister and his party cease to command a majority of the House, he can do one of two things. He can resign, in which case the leader of the Opposition will be called upon to form a Government and take over the executive work of running the country, a prospect which is apt to engender serious and sobering thoughts in the minds of the Opposition. Alternatively, the Prime Minister can ask for a dissolution, in which case there will be another General Election, a course which is usually unpopular with members holding seats by slender majorities. All this makes for a sense of responsibility on the part of both the Government party and the Opposition.

From this sketch of the working of the British Constitution you will see that certain consequences follow. In the first place, there is such a thing as Cabinet responsibility. Before a policy is adopted it must be the policy of the whole Government. For this reason there exists a whole nexus of Inter-Departmental Committees attached to the Cabinet Office. Some are committees of Ministers, some committees of civil servants and some mixed of Ministers and civil servants. Through these committees interdepartmental differences and disputes are ironed out

in private so that the Cabinet can adopt a policy for which all members of the Government are equally responsible. It follows from this concept of Cabinet responsibility that statements made on behalf of the Government commit not only the Minister making the statement but the Government as a whole. This applies to all statements made in Parliament whether great or small and to all major ones made outside Parliament. For example, the nation assumes when it hears the Prime Minister or the Foreign Secretary speaking at the Lord Mayor's banquet in Guildhall that what he is saying has been considered and adopted by the Government as a whole and that the Government as a whole is responsible for it.

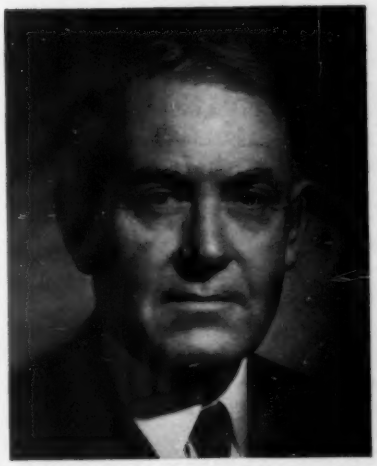
You will notice also that the Government have to justify themselves to the House of Commons day by day and night by night not only on matters of major policy but also in respect of day-to-day working of the various departments, and it follows from this that the appeal the Government makes to the public is mainly through the public's representatives, namely the members of Parliament, and less by direct appeal through the press or speech or radio to the public at large.

The American System . . . Separation of Powers

Contrast now the way in which the United States Constitution works. There there is no general election. There are separate elections for the President, for the House of Representatives and for the Senate. Not only are these separate elections but they take place at different times. One of the reasons why it is so difficult to get anything done in the United States is that there is nearly always an election either pending or in preparation. The President, who in substance though not in form is elected by direct vote of the people, is the chief executive and the Commander-in-Chief. Even General Marshall never rose higher than to be Chief-of-Staff. The President is and regards himself and acts as a direct representative of the people. The President chooses his own ministers and they cannot be members of either the House of Representatives or the Senate. Although the body of ministers is sometimes loosely called a cabinet it is not a cabinet in the British sense of the term at all. There is no such thing as cabinet responsibility. Thus any minister is entitled to make any statement he wishes without committing either the government or any member of the government other than himself.

The three elements in the Constitution therefore have separate principal responsibilities. The President feels himself directly responsible to the people. Each Senator feels himself primarily responsible to the state which sent him to the Senate. Indeed a Senator has been aptly described as an ambassador for his state in Washington. Members of the House of Representatives for the most part feel that their primary responsibility is to the electoral district which they represent. The President is hampered in his executive duties if Congress is hostile, but he can carry on. Indeed the President principally needs the help of Congress (1) to supply money; (2) to get through legislation needed for the furtherance of his executive policy; and (3)—perhaps most important—to prevent the passing of legislation hostile to his executive policy. It is for this reason no doubt that the President is given a limited veto on congressional legislation. In addition, the Supreme Court is given powers to disallow on constitutional grounds the legislation of Congress.

A further consequence of all this is that each of these three elements in the Constitution will use its own method of direct appeal to public opinion. The President may appeal directly to the nation, for example, over the radio in the form of "fireside chats" or through the medium of a press conference. Many of the proceedings in committee of the Senate or the House of Representatives will be conducted with a view to informing or changing public opinion, and will contain a strong propaganda element for persons or policies or both. These committees will also call before them members of the Government, these members not being Senators or Representatives and there being nothing in the nature of a parliamentary question.



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Misunderstandings . . . Some Basic Causes

It is against this background of differences of objectives and working between the United States and the British Constitutions that I invite you to consider the three major misunderstandings to which I have referred.

Let us take first statements by ministers. If the Prime Minister or a leading British Minister makes a statement on a matter of Government policy, then in the nature of things that statement is and should be taken as the collective view of the Government, for which the Government as a whole is responsible.

If the Secretary of State or some other member of the United States Government makes a policy statement, one cannot and should not assume that it is a statement of policy on behalf of the United States Government. It may be grossly unfair and wrong to make any such assumption. To understand the meaning and weight to be attached to a statement by a member of the United States Government, one has first to ascertain to whom he was speaking and why he was speaking and on what occasion. It may well be that he was making a considered policy

statement on behalf of the United States Government. When that is being done you will invariably find that that statement is in the measured, courteous and considered terms one would expect to find in the words of the Government of a great nation. There may be a struggle going on in the formation of policy between different members of the Government. One minister may be fighting with his colleagues. In that case the only person who can settle the dispute is the President himself. The President will usually have his ear to the ground and will be reluctant to settle the dispute until he has some idea of the reactions of public opinion to it. The struggling ministers therefore may well put their respective points of view before the nation either on the radio or in the press or through some other medium of publicity. A statement of this kind, and there are many of them, may mean a number of different things. The one thing that it cannot mean is that it is a statement on behalf of the Government of the United States. This is a constant source of confusion in the public mind in this country and I would counsel any of my English friends who incline to become irritated by something they read in the newspapers that has been said by a United States minister, to find out the occasion on which he was speaking and the purpose for which he was speaking, and not to confuse what was said with a policy statement of the Government.

May I give you a direct illustration of this with which I was personally concerned during the war. There was considerable interdepartmental strife as to which department should be responsible for certain activities closely concerning national security. The only person who could settle this dispute was the President and the President resolutely refused to act until the matter had been fought out before the bar of public opinion. In consequence we had the spectacle, which made my blood run cold, of the Army, the Navy and the Department of Justice and other departments arguing these matters in the press. It was not until this argument had been concluded that the President would act. So when you hear that Mr. Dulles is reluctant to have British or French soldiers on his side, please remember that when he said that he was probably using some argument apt to the occasion on which he was speaking and was certainly not expressing the view of the United States Government or even probably his own considered view. To think otherwise can be grossly unfair and misleading.

One has also to remember that the statement of which we read may be made before a committee of the Senate or the House of Representatives (and very much publicized) although the minister concerned would often far prefer that the remarks he makes in the rough and tumble of cross-examination by the committee should be treated as private.

From what I have said you will observe that it is easy to fall into the second misunderstanding to which I have referred, namely a misunderstanding of the purpose and conduct of the committees of the Senate and the House of Representatives. There is a sense in which from the British point of view both Houses of Congress are irresponsible. I have referred already to the sectional loyalties of Senators and the members of the House of Representatives. Many of them are prepared to put their names to legislation which will suit their particular constituents relying upon the President's intention to veto the bill or the probability that the Supreme Court will declare it unconstitutional. There is moreover the thought that there is never any risk of the minority or opposition party having to form a Government and become responsible for the executive conduct of the business of the nation. It follows that a large part of the work of these committees serves as propaganda, and how effective that propaganda can be one realizes when one has, for example, watched on television the proceedings of the Senate Subcommittee on Investigations or the proceedings of the Kefauver committee on gambling and vice rackets. These bear no resemblance whatever to the proceedings of committees of the House of Lords or the House of Commons and the risk of confusion is very serious indeed.

I return finally to the question of tariff policy. Tariff policy is naturally an important part of the executive business of the nation but being concerned with finance it is also the business of Congress. The President has the duty of considering the matter from the national point of view. The Senators will consider mainly the interests of their states and members of the House of Representatives mainly the interests of their electoral districts. The only tariff bill that can be got through Congress is one that will represent a series of compromises between these sectional and local interests except insofar as the President has such prestige and influence with Congress that he can inject the national point of view into the argument. The wonder is that, constituted as they are, both Houses of Congress show as much concern for the national interest as distinguished from sectional interests as they in fact do.

You may think that I have been perhaps a little critical of both Constitutions and the way they work. I want to end by reminding you that they do work. The United States Constitution has proved itself a flexible instrument of government adapting itself to the changing circumstances of the time. It has brought constitutional government and freedom under the law to a continent of diverse geographical, economic, racial and climatic conditions. The British Constitution has brought freedom under the law not only to this country but to vast areas of the world in Her Majesty's Dominion beyond the seas. Both have been potent influences for good in the world, and if you think I have been critical it is only with the object of helping towards the understanding of two systems which have been, and still are, of such incalculable value to the human race.

The Traffic Problem:

The Lawyers' Responsibilities

by Orla St. Clair • *Judge of the Superior Court of San Francisco*

Judge St. Clair writes that our whole approach to the problem of enforcing the traffic laws is wrong. We are using the techniques that we use in the criminal law, he points out, to enforce laws that the general public does not regard as criminal in nature. The result is a general disrespect for all law. He calls for a rethinking of the legal aspects of the problem of traffic violations.

One of the basic principles of Anglo-American criminal law is that it is better that nine guilty men should go free than that one innocent man should be convicted.

Certainly one cannot quarrel with that philosophy. Unfortunately, we have drifted along without any proper regard for the growth in the number of automobiles or the peculiar and terrific impact that modern transportation has had on our civilization.

There needs to be better understanding between the law and the lawyers on the one hand and the thinkers and doers in the realm of coping with the automobile on the other. I hate to say it, but the fact is that the majority of the lawyers who form the backbone of any Bar often take the position that the administration of that portion of the criminal law that we call traffic law means nothing to them.

I have done a lot of talking before groups concerning various aspects of the problem of traffic. I can't begin to tell you the number of times that lawyers, after such talks, have come up to me smiling, saying that they enjoyed my talk, but that criminal law or traffic law was of no interest to them because they didn't practice in those courts. Such a lawyer is indeed fooling himself. He is a member of the Bar, and the Bar as a whole is responsible for the administration of all laws, including traffic laws.

It is a fundamental in traffic law enforcement that the traffic court symbolizes our courts and our judges and lawyers to the public. This is so because most people never become involved in litigation. Almost everyone drives. Ergo, almost everyone at some time receives a traffic citation. The appearance in court or at a fines bureau consists of the only direct contact that the overwhelming percentage of American citizens will ever have with our courts. It has been reliably estimated that of the American citizens who appear in our courts, 91 per cent to 96 per cent only see, and appear in, a traffic court. If there are techniques of enforcement and unexpected results of enforcement that breed disrespect for the law, techniques that foster an individual (and later a community) feeling that the traffic laws are not being enforced impartially, a real blow has been struck at the administration of justice.

Most lawyers might say that, as officers of the courts, they have no higher obligation to the traffic court than to any other, and no different obligation in this age from any other. This is not so. In the first place, the traffic courts need more help than other courts. In the second, the traffic court is but one cog (though an important and probably the ultimately responsible cog) in a complex of enforcement authorities and techniques. Any and all results of this complex that are or appear to be bad must necessarily reflect on the traffic court and on all other courts that are in the minds of the public.

Lawyers will agree that justice requires access to the courts. It also demands enough judges and courts to give the participants time and opportunity for a full and fair hearing.

Statistics are dull, but I should like to cite some San Francisco figures to bring home the points that I want to make. The volume of 1955 traffic cases in San Francisco, to which I am about to refer, was handled by one judge assigned to moving traffic violations and one, on a part-time basis, handling parking violations. Certain of the major violations were handled in the normal routine of criminal cases, in the three criminal divisions, but there were not many of these.

In San Francisco, in 1955, 756,308 people were accused of a crime that

brought them into Municipal Court. Of these, 734,825, or 96 plus per cent, were traffic citations. Of this number, 598,423, or 81 plus per cent, were charged with parking violations and 136,402, or the remaining 18 per cent, with moving violations. There were 1,411 felony matters and 20,072 misdemeanors other than traffic charges in the San Francisco court. Of the 136,402 moving violations, 22,801, or 16 per cent of the moving violations, appeared in court. The remainder were handled in the Traffic Fines Bureau. Of the 598,423 illegal parking violations some 23,016, or 4 per cent, appeared in court.

Three departments handled the 1,411 felony matters and the 20,072 misdemeanors other than traffic. The traffic matters were handled by the courts I have heretofore mentioned.

Let me point those figures up. One judge, handling moving traffic violations, tried 23,016 cases. Three judges tried 20,072 misdemeanors other than traffic, plus 1,411 felony preliminary hearings.

Assuming 250 court days in a year, that means that the traffic judge handled 91 cases a day. It is obvious that many of these resulted in a plea of guilty, but the need of time for the judge to consider the proper sentence is still there.

Remember, too, that 113,601 moving traffic violations were handled by the Traffic Fines Bureau and did not get even the "once over lightly" treatment that the traffic judge was able to give the cases that poured through his court.

The present Municipal Court of San Francisco inherited the nationally used technique of handling traffic matters on a volume basis. As far as I have been able to determine, this bad practice, like Topsy, "just growed". In 1920, the number of automobiles and the miles of travel began to rise sharply. Unprepared, the courts would have broken down under the volume except for the creation of Traffic Fines Bureaus. The attitude appeared to be that this new type of defendant, the traffic violator, was not a criminal although he had broken a law; he was "just folks like you and me", although certainly a nuisance. The combination of these and many other factors led to mass handling and hurried assessing of a small fine. A jail sentence was and is practically never considered.

Very little or no thought was given to the over-all effect on the administration of justice of the technique adopted to handle the tremendous volume of new business.

Criminal Law . . . A Poor Tool for Traffic?

Our criminal procedure is, at best, a poor device for the rehabilitation of erring brothers and sisters, though no doubt a good one for punishing them. San Francisco assigns three judges to try and sentence non-traffic misdemeanants, many of whom are professional criminals that the courts cannot deter or rehabilitate.

Traffic education under court supervision and punishments tailored to act as a deterrent for each particular traffic violator would pay tremendous social and economic dividends.

I have never made an analysis of the origins of traffic codes or, more important now, of proposed amendments. Obviously the interests and the forces are very complex. Lawyers acting through the American Bar Association and its Committee on Traffic Court Program have become one of the forces. Here, directly and specifically, lawyers have assumed a responsibility to the traffic court.

Prosecuting attorneys are lawyers who, through their District Attorneys' Association, make themselves heard in the legislature on traffic matters. Here, again, lawyers have assumed a specific responsibility to the traffic court and to the complex of traffic enforcement. In addition, of course, the prosecutor is involved day by day in the problem and appears before the public as an interpreter of what should be done about social control of this monster, the automobile.

As the saying goes, all generalizations are faulty, including this one, but I have a general feeling that prosecutors tend to favor increase in the severity of punishment as the solution for non-obedience to the law. Certainly many legislatures do. Legislatures contain many lawyers.

I am not seeking a quarrel with those who feel that harsher penalties are the answer to crime, but I can't help but feel that they have not studied the history of penology and of imprisonment. In medieval times frightful penalties were imposed. Punishments fitted the crime, but in this case it was not any Gilbert and Sullivan approach—spies had their eyes gouged out; perjurers had their tongues torn out and rapists were castrated. History does not reveal that these tactics stopped crimes.

Sir Winston Churchill, in Volume 2 of his *History of the English Speaking Peoples*, puts his finger on the problem and describes the results. In 1650 Cromwell's Parliament passed a law making adultery a crime punishable by death, a ferocity, as Sir Winston puts it, "mitigated by the fact that nothing would convince the juries of the guilt of the accused". Remember, jurors drive automobiles. Remember also that, contrary to the generally accepted theory, judges as well as juries are human.

Defense counsel are not organized as are the prosecutors. Their opinions are seldom advanced in any organized way to the legislature. Their influence is felt, however. They tend to wait until legislation is on the books and then use its severity as a means of persuading juries and judges to find defendants not guilty.

As I think I can demonstrate to you, it is time for us to take a look to see if the results of some of the legislation on traffic has been what was expected. It is my thesis that the Bar must take the lead in this evaluation, partly because we have, rightly, "stuck our necks out" by assuming a responsibility, and partly because, as we have seen, the traffic court, and the complex of traffic enforcement, represent all courts and all lawyers to the public.

There are many illustrations of unexpected results of criminal laws; the one that springs first to mind, of course, is our late and not lamented prohibition law. Another painful illustration is the unexpected results of the narcotic laws. When I was a boy in a small town in California there were addicts, all right, who were given or

sold laudanum and other narcotics of the day just to keep them going. There were not many of them. Society decided to put a stop to this practice and make it illegal for the druggist or doctor to sell dope or to give it away.

Thus began the black market in dope, since there were no dope peddlers when the dope user (or dope fiends, as we called them in those days) could easily get it. When the legislation to put dope fiends out of existence resulted in legislating the dope peddler into existence, society decided to abolish him by putting teeth into the law. This was done, and society settled back in contemplation of a happy and dopeless existence.

By shutting off a legitimate supply of narcotics and making it more dangerous to be a peddler, there was more profit, and it wasn't long before the peddling of dope became big business for the underworld. Today we have the preposterous situation that we have dope even in our high schools. The teeth that society put in the law have "hooked" an innocent bystander, to make a bad pun, to wit: A kid who now has a habit that is so expensive that he can only finance it through constant stealing.

Let us turn to the traffic laws and see if we cannot find some unexpected results that, in the long run, may be more dangerous and disadvantageous to society than the two I have just cited.

Without revealing my age, I can say that the automobile first appeared on the streets of Santa Rosa when I was a young boy. To those of us who are of that vintage, and we are the ones who have written the vehicle codes, an automobile is simply a convenience and necessity to which we have become accustomed.

Today's Youth . . . A Compulsion To Drive

Not so a young man of today. He was born, reared and grew up in a society that is basically mobile, and to him the automobile is not only an integral and essential part of his life, but a wonderful and marvelous thing.

Young people today simply must drive. The social compulsion to drive an automobile is so terrific that we must face up to the fact. I don't know whether or not the real cowboy was or is anything like the cowboys that we read about, but certainly these modern kids are just as compelled to use their automobiles to go a short block as the cowboy was to use his horse for the same distance.

A judge, in quite proper and righteous indignation, suspends the license of a young man, teen-ager or older. In revoking that license the judge should face up to the fact that he is creating a criminal, for ninety-nine times out of a hundred the young man is going to walk out of the courtroom and drive; in all probability he will drive home. The urge to drive is so strong that we who do not have it should, as they say in military parlance, fall back and regroup and think through this modern problem.

I am an outright opponent of suspending the licenses of those that are physically and emotionally capable of driving. (I am here talking about the "don'ts" constituting some 80 per cent of the drivers and not the "can'ts" or "won'ts," as those terms are used by traffic enforcement professionals.)

We are creating criminals.

We are breeding, wholesale and retail, disrespect and disregard of the law and the courts.

Let us look at the Traffic Fines Bureau that I characterized as being Topsy-like.

The Fines Bureau is a place where a citizen, having been cited for certain moving offenses, can go and deposit bail. The amount he may deposit for the so-called "minor" offenses is widely publicized.

We lawyers have insisted that we not abandon our theory of criminal law in the Fines Bureau cases. Each citation constitutes a "case" and must be docketed. The defendant is named, a docket number is given, the offense listed and all other preliminary mechanics of criminal procedure are followed. On one day in San Francisco over 900 moving citations are issued. Probably some 700 show up in the Fines Bureau. That is the Fines Bureau Docket for that day.

The important thing to note about the Fines Bureau is that the citizen almost universally thinks he is paying his fine; the concept of depositing bail, in contradistinction to paying a fine, just has no meaning to most people.



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The procedure in question amounts to licensing violations of the law. A moment's reflection will show the emphasized statement is correct. If a motorist knows it will cost $5.00 if he is caught failing to stop at an arterial stop, the factors are present for him to take a calculated risk. The habitual runner of stop signs is a potential killer, and that is how accidents are born. If this habitual runner knew that the punishment would be tailored to fit him and the particular crime, he would hesitate.

Human nature being what it is, if the fine that is assessed for a violation is known to be minor, it will bring a disregard for the law.

Licensing violations of the law is not the only element of our traffic enforcement techniques that creates law breakers. A second one has to do with bench warrants issued for failure to appear at the time promised by the violator when he signed the citation.

The problem of the Police Department in serving these bench warrants

is a tremendous one. Defendants who are dodging bench warrants are difficult to apprehend (no search warrant accompanies the bench warrant) and the officer serving the warrant has no way of knowing, first, where the defendant has moved to, if he has moved; and, second, whether the present occupants of the address in question are lying when they say the defendant has moved. This and other difficulties in serving bench warrants brought us at one time in San Francisco to the preposterous situation where some 20,000 bench warrants were outstanding and unserved.

Many of these defendants are openly scoffing and laughing at the law. Men young and old are apprehended against whom there are outstanding ten, twelve or fifteen bench warrants. At hearings in my court, time and again it has been made perfectly clear that the defendants are openly flouting the authority of the court. There are far too many of these "scoff-laws", but their pernicious influence spreads far beyond them. The news spreads that one can "get away with" ignoring bench warrants. The honest citizen is soon disgruntled and convinces himself that he is a "chump" to be honorable. Good law enforcement becomes impossible.

The third and last technique to create law breakers to be considered today is the element of the "fix".

George Warren, a leading authority on traffic, states:

"The 'fix' is singly the most pernicious influence and detrimental practice in the field of traffic law enforcement."

The fix is indeed a cogent element in the creation of law breakers and flouters of the authority of the court and of the law. To go back to our citizen who makes a habit of failing to stop at stop signs—it requires no deep student of human nature to realize that a driver who knows that his tickets can be fixed is going to be careless about observance of the traffic laws. It is axiomatic that failure to obey the traffic laws brings accidents, and that accidents mean death, injuries and economic loss.

What Can We Do? . . . The Problem for Lawyers

What does all this mean to lawyers? The American Bar Association, the State Bar of California, the Bar Association of San Francisco, the Lawyers' Club and practically all associations of lawyers have extensive and expensive programs on public relations. Citizens by the millions are receiving and crystallizing their impressions of courts, and hence of lawyers, in the traffic courts. The Bar has given little indication that it sees and recognizes the problems and the dangers inherent in the traffic court situation.

By definition, a lawyer is a professional man or woman, an officer of the court, who has a love and a zeal for the administration of justice. It is my firm conviction that the majority of lawyers have no knowledge or experience that would instruct them as to the impact of the automobile age on the traffic court and hence on the administration of justice. If and when lawyers do realize the need for more judges and further learn about the evils now surrounding our traffic courts, the need for correction will be plain.

This is not an attempt to catalogue all of the effects of the impact of the automobile age on the administration of justice. Some claim that our court procedures originated in the horse-and-buggy days and could stand some change. However, the problems here considered stem from the unexpected results of the complex of traffic enforcement, created by the swift arrival of the age of the automobile. It is the procedures and techniques outside the court, plus the failure to provide enough courts, rather than poor procedures in the courtroom itself, that are causing the trouble.

Fair and impartial enforcement is the only source of respect for and confidence in the courts. The fact that 91 per cent to 96 per cent of citizens know our judicial system only through their traffic court experience makes it mandatory that our courts avoid even the appearance of evil.

All that I ask is that the organized Bar really look at the problems. Nothing is gained by pretending that they do not exist. The automobile is here to stay.

Once lawyers and the organized Bar know the facts and accept their responsibilities, techniques for improving the administration of justice in the traffic court will develop. The real danger is that the conscience of the Bar will find itself in the position in which Mark Twain found his conscience in his story, "The Facts Concerning the Recent Carnival of Crime in Connecticut". By some magic, happy or otherwise, Mark Twain's conscience became visible to him. Naturally, he leapt after it to kill it (it looked pretty shrunken and hideous), but the opportunity to get rid of this conscience, which had bothered him all his life, made him so happy that his conscience, thereby made light as a feather, easily kept skipping out of his reach. But then his Aunt Mary entered the room, and, seeing the glare in his eye, began her oft-repeated prayerful plea against smoking. Naturally, his conscience drowsed off under the callousing reiteration, and so he was able to catch it when it was asleep and tear it "to shreds and fragments", and the "Carnival of Crime" in question was the result.

Unless the Bar quits drowsing under the oft-repeated story of its responsibility to and for all courts, including the traffic court, the Bar's conscience risks suffering the fate of that of Mark Twain.

What can lawyers do? The answer lies in realistic analysis of our traffic laws and public support for the traffic court, in both of which an organized Bar must participate. Public support and any worthwhile action in a modern metropolitan area necessarily means organized access to mass media of communication. There are many organizations working on traffic safety from the engineering, educational and enforcement points of view. The techniques of what to do are known. These organizations—the National Safety Council and many others of similar character—are ready to give advice concerning the necessary safety procedures. To put these procedures into effect, a city needs what is called a

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A Contemporary Crisis:

The Problem of Usury in the United States

by Theodore Sager Meth • *of the New Jersey Bar (Newark)*

Usury is one of the oldest problems of civilization. It was condemned by Aristotle and in the Bible, and through the Middle Ages the taking of interest for the use of money was frowned upon. The prejudice persists today even in a capitalistic society which fully recognizes the fact that money has an exchange value. In this article, Mr. Meth examines the modern law on usury and finds that it is a hodgepodge, resting on no clear-cut rationale.

Since colonial times both New York and New Jersey have had an established policy against usury.[1] A recent illustration of this policy is the enactment by New York of a law which allows the defense of usury to be asserted by a corporation, the principal asset of which is a one- or two-family dwelling on which a mortgage is to be placed.[2] The New Jersey Supreme Court in *In re Greenberg*, 21 N. J. 213, 121 A. 2d 520 (1956), reaffirmed *Gelber* v. *Kugel's Tavern*, 10 N. J. 191, 89 A. 2d 654 (1952), (where the use of a corporate shell to cloak a usurious loan to an individual was condemned), suspending an attorney who, among other acts warranting discipline, violated Canon 32 of the Canons of Professional Ethics in that he formed such a corporate shell, thus rendering "service . . . involving disloyalty to the law" and failing to comply "with the strictest principles of moral law".

The "sympathetic sweep"[3] given to this policy against usury was greeted with approval in the law reviews.[4] They assumed that usury control is a matter of moral concern, and not merely a problem in rate-making and economic fact-finding.

The purpose of this article is to examine that assumption.

I.

The term "usury" originally applied to the exaction of any interest on the use of property. Aristotle regarded it as unnatural.[5] The Old Testament forbade it as unbrotherly.[6] Both views were formulated in a time when the rates chargeable for money and grain futures were exorbitant.[7] The need for capital, however, led to the narrowing of the definition of usury to the exaction of interest in excess of a legally prescribed rate. Thus 30 per cent on money was allowed in Egypt, and as late as A.D. 325, 50 per cent on profits was permissible in the Roman Empire.[8] Jews and Christians who were not clergy were allowed to lend to those outside their respective faiths, and many sophistries of evasion permitted an even greater latitude.[9] The theoreticians of the Middle Ages associated all money lending with avarice and wickedness. They thought of money as merely a medium of exchange and not a value in itself.[10]

By the end of the fifteenth century, however, statutory maximum rates began to reappear. The Reformation view was that equity and charity were the sole guides for the determination of interest rates in each case.[11] The Roman Catholic Church, after the Council of Trent, saw the possibility of enforceable moderate rates under the civil law and allowed interest, and eventually required ecclesiastical administrators to put their funds at interest.[12]

Meanwhile the new science of economics discovered that money does have an exchange value. The desire to encourage trade and the ingenuity of financiers in evading the maximum rate laws, coupled with a belief that anything which led to an expanding economy was morally just, produced

1. Ryan, Franklin W., *Usury and Usury Laws* (Houghton, Mifflin, 1924), page 28.
2. New York Session Laws 1955, c. 673, § 374; § 374, General Business Law.
3. *In Re Greenberg*, 21 U. S. 213, 121 A. §2d 520, at 524.
4. 24 FORDHAM L. REV. 115 (1955); 30 ST. JOHN'S L. REV. 126 (1955); 11 RUTGERS L. REV. 285 (1956). On a point other than the corporate exception, laxity in enforcing the laws against usury was criticized in 6 RUTGERS L. REV. 568 (1951-2).
5. *Politics*, I, 3.
6. Exodus 22:25-27; Leviticus 25:35-37; Deuteronomy 23:20.
7. SCHAFF-HERZOG ENCYCLOPEDIA (Funk & Wagnalls, 1912), Vol. 12, page 116.
8. *Id.*, 7, page 117.
9. Deuteronomy 15:6, 28:12; Luke 6:34, 35; Council of Nicaea (A.D. 325), Canon XVII; Synod of Arles II (A.D. 443), Canon XIV.
10. St. Thomas Aquinas, SUMMA THEOLOGICA, (Benziger, 1947), Pt. II-II, Q. 78.
11. Nelson, Benjamin N., THE IDEA OF USURY (Princeton University Press, 1949), page 78.
12. CATHOLIC ENCYCLOPEDIA (Robt. Appleton, 1912), Vol. 8, page 77; Vol. 15, page 235; Appendix to Council of Pondicherry, Collectio Lacensis VI, col. 677 (1871).

a milieu ripe for Turgot's *Les Prets d'Argent* (1775) and Jeremy Bentham's *Letters in Defense of Usury* (1787). By 1867 all control over interest was basically abandoned in France, England, Denmark, Spain, Holland, Sweden, Belgium, Prussia, The North German Confederation, and, in the United States, in Massachusetts. By 1921 many other countries and the States of Colorado, Maine, New Hampshire, Nevada and Rhode Island followed this trend.[13]

In those states which did not agree with the economists, pressure from business led to legislation which disallowed corporate interposition of the defense of usury. The first legislation was in 1850, following the concern which resulted from the decision in *New York Dry Dock Bank* v. *American Life Insurance and Trust Co.*, 3 Sandford 215, 3 N. Y. 344 (1846). Of the forty states which today have maximum rates of 11 per cent or less, fifteen do not allow corporations to assert the defense of usury, though this is enforced with varying degrees of strictness.[14]

Today thirteen states have a maximum interest rate of 6 per cent; twenty-seven states range from 7 per cent through 11 per cent; and nine states allow 12 per cent or more.[15] As to the statutory penalty for usury, thirteen provide for forfeiture of the excess interest above the maximum, eighteen provide for forfeiture of all interest, eight provide for forfeiture of a multiple of interest or excess interest, five declare a forfeiture of principal as well as interest, one declares a forfeiture of 8 per cent of the principal and all interest, and in seventeen states usury is, in addition, a crime or misdemeanor.[16] Though the policing of usury is not uniform, the policy is still vital.

II.

The contemporary economist maintains that fixed maximum rates for the use of money are never justified. He is surprised that they persist in a capital society where the control of rates for goods and services is usually justified on the basis of war emergency. He feels that tampering with interest is tampering with price.

He regards interest as a simple "coefficient of tension in the system" in which lenders move from business innovation opportunities to other such opportunities as each arises, deferring present enjoyment of income in order to reap the benefits of increased technical efficiency through fuller capitalization.[17] The upper limit of interest is determined by the supply and demand for capital. It is "the surplus which production (or the net proceeds of production in other goods) makes possible to be left over, above the sum of wages, rents, etc., paid out, a quantity dependent on the one hand upon the productivity of business, and on the other upon the level of wages and rents", including managerial wages.[18]

Apart from legislation, the interest rate will be market determined. Whether the rates should be at marginal equilibrium, as Knut Wicksell advocated,[19] or just below the demand for loan capital in relation to the supply of savings as Friedrich Hayek insisted,[20] all agree that interest is essentially a monetary phenomenon. If, therefore, the maximum rates, where they are well below the normal level, were not widely nullified by avoidance and evasion, prices would rise sharply.

Actually, the methods of avoidance and evasion of the usury laws are multiflorate. Discounts, bonuses, commissions, extra charges of all sorts, brokerage fees, procuring fees, attorneys' fees and side agreements are examples. Commercial ingenuity has added to these the sale of commercial paper; fictitious prices on goods sold; drawee balances of 25 per cent of loan; required term insurance; contingent, compound and advance interest; salary buying; and the like.[21]

Economists are not sympathetic to the outcry concerning usury. They feel that it is in times of economic distress that debt payments, light-heartedly undertaken, come to be regarded as usurious, without any fair regard by the debtor to the actual risk of the lender and the character of the need at the time of borrowing for current goods and services.

III.

Juristic economics differs from scientific economics in that it is concerned primarily with the small borrower and the borrower for consumption. While many current professional writers on interest simply disregard consumption loans, in effect treating them as a deduction from the supply curve of savings available for business purposes, as so much "dissaving", legislators and courts seek to control the lender of money who, taking advantage of a borrower's ignorance or need, exacts unduly high charges. They are, therefore, concerned with excessive rates as applied to persons not effectively active in the money market. Theirs is the problem of "moral" usury.

Few legislatures appreciate the fact that general laws cannot stop high market rates for production loans. They should recall the complexity and relative ineffectiveness of the machinery required to regulate market rates for rent and articles of consumption during the administration of the O.P.A.

Attention is drawn to moral usury, *i.e.*, loan sharkism; production loan usury is infrequently aired, except as part of insolvency proceedings.[22] The maximum rate laws are given "sympathetic sweep" and applied without distinction to production and consumption loans; attorneys are disciplined for aiding evasion of usury laws whether the loan is for $200 or $200,000, and whether the loan is obtained to pay for household furniture or to enlarge an industrial plant.

Statutes concerning interest are

13. Ryan, *op. cit.*, pages 51-61. Rhode Island has a 30 per cent maximum rate—no maximum at all for all practical purposes.

14. 8 LAW AND CONTEMPORARY PROB. 48 (1941); see, 38 CORNELL L. Q. 93; *Corradini* v. *V. and M. Holding Corporation*, 34 N. J. Super. 427, 112 A. 2d 603 (1955).

15. The District of Columbia is counted as a state. Twelve per cent is above the current normal market for production loans.

16. Statistics derived from Barrett, COMPILATION OF CONSUMER FINANCE LAWS, National Consumer Finance Association, Washington, D. C. (1952).

17. Schumpeter, Joseph A., BUSINESS CYCLES (N. Y., 1939), Vol. I, page 124f.

18. Dempsey, Bernard W., INTEREST AND USURY (American Council on Public Affairs, 1943), page 11.

19. See, INTEREST ON MONEY AND THE PRICES OF GOODS (London, 1936).

20. See, PURE THEORY OF CAPITAL (Macmillan, 1941).

21. Ryan, *op. cit.*, page 110. For the distinction between evasion and avoidance, see, *United States* v. *Isham*, 84 U. S. 496, 21 L. ed. 728. Another source, 8 LAW AND CONTEMP. PROB. 58; and, 3 Williston, CONTRACTS, § 1692, note 57.

22. Krause, Sydney, *The Treatment of Usury in Bankruptcy Proceedings*, in 29 N. Y. UNIV. L. REV. (1954).

essential where they establish a rate for court judgments, or collectable interest on overdue accounts or promissory notes if the parties have not stipulated a rate. Statutes designed to protect the needy and inexperienced borrower from oppression were also necessary. These were the small-loan and consumer-loan laws.

IV.

Thirty-three states have effective laws in this field; twelve have laws completely ineffective in practice; four have no small-loan or consumer-loan statutes.[23] Many of the states which have the most stringent maximum rates offer the least real protection to consumers. From 1907 to 1942 the Russell Sage Foundation labored to produce increasingly sophisticated versions of a Uniform Small Loan Law; this work was continued by the publication in 1948 by the National Consumer Finance Association of a Model Consumer Finance Act.[24]

The machinery of these laws is similar to legislation for other rate-making and supervising agencies in the field of economic control. A professional administrative corps protects those who have no effective bargaining position in the money market; at the same time it takes into consideration the fact that it costs more to make small loans and consumer loans than ordinary business financing. In place of an *ad hoc* and necessarily sporadic judicial control through litigation, an expert body using actuarial experience calculates a realistic interest rate and then polices its operation.[25]

The loan-shark problem arose out of the great risk of small loans and time payments for merchandise. Today 90 per cent of auto sales are handled by responsible financial institutions whose presence in the field so increases the volume of sales that the cost of the product to the consumer is reduced perhaps below its all-cash cost.[26] Though the maximum dollar figure in many small-loan statutes is too low,[27] so that borrowing-in-extremity today is not sufficiently covered, these laws by and large control moral usury.

V.

The present crisis appears to lie in the field of financing loans between $1500 and $15,000. In most socially conscious states a plan for the control of industrial loans, motor vehicle and household equipment financing, small loans and the various forms of brokerage covers amounts less than $1500. Borrowing in excess of $15,000 is usually for production and either genuine operative corporations are involved or a conventional form of avoidance or evasion is available.

The contemporary problem area is illustrated by *Werger* v. *Haines*, 94 N.Y.S. 2d 691 (1949), 277 App. Div. 1108, 101 N.Y.S. 2d 361 (1950); *affd.* 302 N.Y. 930, 100 N.E. 2d 189 (1951); followed in *Mittman* v. *Kno*, 160 N.Y.S. 2d 746 (S. Ct. 1957). In *Werger* v. *Haines*

> the defendant, J. Valerie Haines, conducted two independent enterprises, one a domestic motor sale business in her individual name, and the other, a corporation organized for importing foreign cars. Mrs. Haines and others desired to borrow money and approached the plaintiff, Werger. Werger agreed to a loan at 6 per cent interest plus $1,000 bonus, but insisted that the loan be made to the corporation. Mrs. Haines and the others signed as indorsers on the corporate notes. Werger in an equity suit sought to foreclose the chattel mortgage securing the notes and asked for a deficiency judgment against the defendants. Usury was interposed as a defense by the individual defendants. Plaintiff's motion for summary judgment was granted in the trial court and affirmed *per curiam* in the Appellate Division, two Justices dissenting. The dissent was a persuasive statement of the rule usually followed in lower court decisions. It pointed out that, to the knowledge of the lender, Mrs. Haines was using the money; that she had put up the collateral; that the corporation to whom the money was ostensibly loaned was defunct; and that two previous loans had been repaid by Mrs. Haines personally.[28]

The New York Court of Appeals affirmed on the basis of *Jenkins* v. *Moyse*, 254 N.Y. 319, 172 N.E. 521, 74 A.L.R. 205 (1930). Given the same set of facts the New Jersey Supreme Court would no doubt have reversed, on the strength of *Pick* v. *Brand, Inc.*, 135 N.J.L. 526, 53 A. 2d 304 (1947). This conflict of authority is not important. The crux is rather the fact that the loan lay in the "middle-size" field, with a relatively insecure business as the borrower. Such were the facts also in *Gelber* v. *Kugel's Tavern* and *In Re Greenberg, supra.*

The New York statute in regard to mortgaging one and two family dwellings is in this field. The declaration of policy attached to the enactment stated that the purpose was to encourage home-owners to establish and maintain communities composed of one- and two-family dwellings. The borrower in the "middle-size" field is not desperately needy or completely inexperienced. He is more likely the victim of his optimism than of inadvertent extremity. The contemporary race for



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23. The full text of these laws is to be found in the compilation cited at note 16. The District of Columbia is counted as a state for the purpose of these figures.
24. It is interesting to note that, in a footnote to §§ 2(a) and 15 of the latter act, a maximum rate of 10 per cent was recommended where any other rate is not in effect.
25. Ryan, *op. cit.*, page 143.
26. 2 LAW AND CONTEMP. PROB. 178 (1935).
27. $500.00, pursuant to N.J.S.A., R.S. 17: 10-2.
28. 38 CORNELL L. Q. 93.

non-productive goods and the confident upsurge in the sale of marginal services is a major impetus to this borrowing.

VI.

Is usury in the "middle-size" field also moral usury? The borrowers are not well informed as to the availability of loans on collateral without payment of excessive interest rates. They are not the traditional victims of usury. They have enough money to pay for the organization of a corporation or to be the principal stockholders in a small or family corporation. It is the middle class, which first fought for the right to lend and borrow widely, which now needs protection![29]

A maximum interest rate law is not a declaration of moral law. If the receipt of interest is in any degree moral, it does not cease to be moral at 6 per cent. It becomes at most socially inconvenient. If one class of loans is allowable at 15 per cent (small loans or car financing), the "inconvenience" of other loans at more than 6 per cent must relate to social fact-finding. An example of this would be a legislative determination that large corporate lending and borrowing at an allowed excess of 6 per cent permits the financial institutions to "carry" the non-corporate "middle-size" 6 per cent loan, according to the analogy of costly $25 loans being "carried" by the proportionately less costly $250 loans in the small-loan scheme.[30] Such a finding could only be justified after extensive scientific investigatorial and tabulative work. This work was not done when the maximum rates were established, nor have courts, called on to act in regard to such rates, sought economic help.

Out of this confusion, and under the cloud of court opinions which treat the violation of maximum rate laws as *quasi malum in se*, may come administrative control of the whole field of money lending. Complete codification based on statistical treatment of cost and risk involved in every class of lending could be implemented by licensing, regulation and supervision. The New York statute of 1955[31] is a feeble and porous move in such a direction. On the one hand, few countries take any steps to regulate the "middle-size" loan; on the other, general abolition of the maximum rate laws in the United States is inconceivable. Indeed, legislative timidity in this area is indicated by the fact that, since 1921, eighteen states have decreased the allowable rate and none have increased it and of the eighteen, one state abandoned no-maximum in favor of a 12 per cent limit.

In the absence of thorough codification and uniformity among the states, what should the courts do? The corporate defense is only apparently a problem: litigation concerning it is symptomatic of the confusion on basic values. The attorney who now forms a sham corporation in New York and then waits seven months before the mortgage transaction does not know if he has helped his client towards lawful ends or precipitated his own discipline under Canon 32.

VII.

Although lending at interest is not immoral, it raises moral problems. Even when devices for usury avoidance are not struck down by statute or decision, the question of the fairness of the transaction remains. Unqualified reference to a maximum rate as the test of fairness or unfairness is pitiably inflexible, unscientific and unrealistic, but what alternative do the courts have?

One solution is suggested in *Barrett* v. *Hartley*, L.R. 2 Eq. 795 (1886); accord, *James* v. *Kerr*, 40 Ch. D. 449 (1889). This case established in England the power of chancery to reopen all interest transactions[32], relieve the borrower of excessive interest, order the repayment of the excess and alter or set aside security arrangements where the transaction is harsh and unconscionable. This power was subsequently enacted in the Money Lenders' Act of 1900.[33]

This approach makes sense in jurisdictions where the maximum rate has been abolished or where it is, in fact, well above the normal market rate. In states where there is a low maximum rate its significance is that it ties together equitable protection with an appreciation of the realities of money lending as a commercial activity. If violation of a maximum rate statute were only *prima facie* usurious, equitable reasoning would still have a place.

Thus it would be possible to avoid total codification, on the one hand and the unscrupulous activity of lenders on the other if the states enacted this version of a maximum rate law, by uniform action:

> Usury is the excessive exaction of interest for loan of money and property. In the absence of other statutory enactment, the taking, upon contract, of interest in excess of [the individual state's maximum] percent shall be deemed *prima facie* excessive.

In a situation like that in *Werger* v. *Haines*, *supra*, neither the treatment of the corporate shell nor the flat 6 per cent maximum would be finally determinative. It would be relevant to ask: How well was the lender secured? Did the borrower have skilled independent counsel and advice? What was the relation between the interest charged and the market, the risk and the cost of making the loan? The burden of proof of non-excessiveness remains on the lender, who is best able to offer such proof.

Judicial control of usury through the equity power will, of necessity, be sporadic and relatively inexpert. The alternative, all-encompassing legislation, may be inimical to our concept of government. Of the two, the former is less likely to interfere with a free market.

Neither court nor legislature can enforce charity. Brotherly love is the work of religion and a tender conscience. But often in times past the judicial dignity has served to raise the sights of the conscience of the business community, in whose hands is the ultimate resolution of the problem of usury.

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29. Blackstone, COMMENTARIES, Book II, c. 30 (1766), quoted in Nelson, *op. cit.*, page 108.
30. 19 LAW AND CONTEMP PROB. 29 (1954).
31. ... "[The] provisions of this section shall not apply to a corporation, the principal asset of which shall be the ownership of a one or two family dwelling, where it appears that the said corporation was organized and created within a period of six months prior to the execution, by the corporation, of a bond or note evidencing indebtedness, and a mortgage creating a lien for said indebtedness on the said one or two family dwelling."
32. *Cf.* 6 RUTGERS L. REV. 568 (1951-2).
33. 63 & 64 Victoria, c. 51.

We Must Go Forward:

Law in the World Community

by John J. Parker

This address was prepared by Judge Parker for delivery at the Annual Conference Dinner of the United Nations League of Lawyers, which was scheduled for March 18. Judge Parker's sudden death occurred on March 17 and the paper thus represents his last work. It is appropriate that it should deal with international justice, a subject in which he was deeply interested and a cause to which he contributed so much. The address is published with the permission of Judge Parker's family and the United Nations League of Lawyers.

I esteem it a great honor that you have invited me to speak before this group interested in international law and the law of international relationships. The occasion suggests the subject on which I should like to talk, "Law in the World Community". The thing that stands out in the history of the last quarter of a century is that within that period this world of ours really has become one community. Any part of it can be reached from any other part in a few hours' time. Communication is a matter of seconds. Strife anywhere is fraught with real danger that the whole world may be involved and the whole fabric of our civilization destroyed. Never in the history of the human race has there been greater need for men of good will to stand and work together for the preservation of those ideals and standards upon which our civilization is built.

In this period of unprecedented crisis and danger, the first duty that confronts us of the free world is to make ourselves strong—strong enough to resist any aggregation of power that may come against us—so strong that no aggregation of power will dare to come. It is true today as it has always been that to be prepared for war is the surest guaranty of peace. Disarmament and appeasement are not the way to peace. They are the way to war and slavery. There is need for scientific education and the development of scientific instruments of warfare. I would not for an instant discount the supreme importance of this and of our duty to make any sacrifice necessary to maintain our strength. While we maintain it, however, we, as lawyers, must not forget that peace will ultimately rest, not upon scientific achievement, but upon the establishment of law in the world community and that the establishment of law is essentially the work of the lawyer.

I have been especially impressed with this recently by three outstanding speeches. One was by Attorney General Brownell in Westminster Hall, London, when standing before the representatives of the Bars of England and America he pleaded for the development of law in international relationships. Another was the speech of the Lord Chancellor of Great Britain at the same meeting in which he spoke of the natural law which underlies all organized life of men or nations. The third was the speech of Charles S. Rhyne, President of the American Bar Association, at Los Angeles, in which he urged the lawyers of America to lead in the development of legal machinery by which the principles of law could be interpreted and applied in international affairs. These were practical men. They were talking sense. And their message is one which I would echo here this evening.

What is law? Law is not a mere collection of rules and forms and precedents. Law is the life principle of organized society—the categorical imperative which prescribes how organized society must live. It is not imposed from without, but arises from within the social organism. As Cicero put it, "Law arises out of the nature of things." The Lord Chancellor referring to this law of nature as "one of the noblest conceptions in the history of jurisprudence", quoted the following eloquent statement of Lord Bryce, regarding it:

> It is Simple and Rational, as opposed to that which is Artificial or Arbitrary. It is Universal, as opposed to that which is Local or National. It is superior to all other law because it belongs to mankind as mankind, and is the expression of the purpose of the

> Deity or of the highest reason of man. It is therefore Natural, not so much in the sense of belonging to man in his primitive and uncultured condition, but rather as corresponding to and regulating his fullest and most perfect social development in communities, where they have ripened through the teachings of Reason.

When this noble concept of law is accepted, it follows that the development of international law is natural and necessary. When men deal with each other across international boundaries or travel into foreign countries for the purpose of trade and commerce or for other reasons, relationships are established, customs arise and reason prescribes rights and duties in numberless situations. Without any international legislature, there arise rules and standards which are enforced by the common consent of civilized peoples. They are evidenced by the decisions of courts, by treaties between nations and by the writings of the wise and the learned. This is international law; and the real purpose of any world order must be to develop and give expression to this law to enforce it fairly and justly among men and nations. In no other way is it possible to establish an enduring foundation for world peace.

We must never forget that peace is not a negative but a positive thing. Peace connotes not mere absence of conflict, but the orderly functioning of life in accordance with the laws of life. I have peace within my body when all the members function in accordance with the laws of the body. We have peace within a city when all elements live in accordance with the laws of the city. And we shall have peace within the world only when the life of the world functions in accordance with the laws which reason prescribes for the functioning of world life. This is the great challenge to the lawyer today. Of the three learned professions, says Ruskin, it pertains to the minister to teach, to the physician to heal and to the lawyer to give peace and order to society. The lawyer has performed this function as the family has developed into the tribe and the tribe into the nation. If civilization is to live, he must perform it as nations merge into the world community. His duty it is to develop legal institutions which will give form and content to the rules which arise out of international relationships and provide for their enforcement in such way as to preserve the peace and order of the international society which has come into being. The time is ripe for the effort. The world is growing weary of the strife and bickering in international affairs, with the ever-present threat of terrible calamity upon the breaking out of international strife.

While we were engaged in the great world war and were standing on the mountain peaks of heroic achievement, it was generally assumed that the ending of the war was to be followed, as a matter of course, by the building of an international organization for the establishment of a world order based on law. When the danger passed, however, and peace had come, many who should have led in the movement lost their enthusiasm for it; and among those who lack vision and understanding the feeling has arisen that international organization is not practical. I believe not only that it is practical but that it is the only practical approach to the problems which confront us. Such organization does not mean the building of a super state as the World Federalists advocate, but it does require three things, which, I submit, are eminently practical, *viz.*: (1) adequate judicial machinery for the settlement, on the basis of reason, of disputes of an international character; (2) adequate legislative machinery for bringing to bear the intelligence of mankind upon the solution of international problems; and (3) adequate organization of force for the preservation of peace and the enforcement of law.

Machinery for Settlement of International Disputes

There is no reason why disputes of states should not be subjected to judicial settlement, as is required by the Constitution of the United States in the case of disputes between the several states of our union. I remember that some years ago there was a dispute between my state and the State of Tennessee over a boundary line, just the sort of dispute that has so often led to war; but did we call out the militia and declare war on Tennessee? We did not! We brought suit against her in the Supreme Court of the United States and the Court had a commission run and established the boundary. Back in the seventies, North Carolina repudiated some bonds that she had issued. Some of them came into possession of the State of South Dakota and she demanded that we pay them. We refused to do so on the ground that the bonds were fraudulent. South Dakota did not declare war on us. She sued us in the Supreme Court; and the Court gave judgment against us; we paid the judgment and now we have forgotten all about the matter. There is no reason in God's world why the controversies plaguing the Middle East should not be settled on the basis of reason by some sort of international tribunal.

The Permanent Court of International Justice set up pursuant to Article 14 of the League of Nations functioned successfully in the judicial settlement of international controversies. It was manned by judges of outstanding character, including among others Mr. John Bassett Moore, Chief Justice Hughes, Secretary Kellogg and Professor Manley O. Hudson, and made a real contribution to the law of the world. It has been succeeded by the International Court of Justice created under the charter of the United Nations, and the jurisdiction of that court has been accepted by practically all the civilized nations of the world including our own country. There is no reason why justiciable disputes between nations should not be settled by this court.

As President Rhyne pointed out in his Los Angeles speech, however, the International Court of Justice should hold sessions in different parts of the world, so that the people can see it in action and become familiar with its jurisdiction. And in this connection I would make another suggestion. I believe it would be well to create a system of inferior international courts, with appeal to the International Court of Justice, to hear cases arising between citizens of different countries involving large amounts or delicate international

questions. One of the fertile sources of international conflict is alleged injustice to nationals, as where contracts are not properly enforced or property is confiscated by unjust decisions. It seems to me that such a system of international courts would command the confidence and respect of those who trade, travel or invest their money in foreign countries, and would thus do much to extend commerce and unify commercial and business law, as well as avoid some of the most fruitful sources of international conflict.

The jurisdiction of these courts would correspond in a general way to the diversity jurisdiction exercised by our federal courts where the parties litigant are citizens of different states. It finds analogy also in the jurisdiction formerly exercised by extra-territorial courts such as the United States Court for China or the Mixed Court of Egypt. Such courts were recommended in a report of a Committee of the American Bar Association composed of some of the ablest lawyers of the country, among others Mr. John W. Davis, former Senator George Wharton Pepper and former Attorney General William D. Mitchell.

The latest example of a provision for peaceful settlement of international disputes under law is in the treaty creating the European Economic Community, where a seven-member court is created to decide disputes between members of that Community. The Charter of the Organization of American States provides that "every American state has the duty to respect the rights enjoyed by every other state in accordance with international law". But there is no court such as the new European Court to decide disputes. There is an Inter-American Council of Jurists which now serves as an advisory body and could easily be transformed into a court. As Mr. Rhyne has pointed out, "Here is a chance for the Americas to show leadership in the search for machinery to maintain peace by creating such a regional court as a part of the Organization of American States. Such a step could well be a historic breakthrough of momentous proportions because of the example it would offer to the world."

Provision should be made, also, for the setting up of criminal courts for trying war crimes and other criminal offenses against international law. In the past, persons accused of such crimes have been tried, *ex necessitate*, in national courts; but it is highly desirable that an international court be created for trying crimes of this character, or at least that provision be made for the setting up of such a court if occasion for the exercise of its jurisdiction should arise. Through lack of such a court, those charged with having committed the most heinous war crimes during the First World War were allowed to escape punishment and the world was deprived of the salutary influence that their trial would have had upon world opinion. Crimes committed in the Second World War were brought to trial and punished before the International Military Tribunal and military courts established by the several victorious nations; but much bitter controversy would have been avoided and the results would have been more readily acceptable, certainly by the conquered nations and possibly by the world at large, if the courts which conducted the trials had been set up by an existing international institution such as the International Court of Justice.

Adequate machinery for the judicial settlement of justiciable disputes between nations and their nationals, with arbitration of disputes that are not of a justiciable character, and with machinery for the trial of criminals who commit offenses against the law of nations will not only help preserve the world's peace but will also lead to the healthy growth and expansion of international law. Every lawyer knows that the most important developments of the law have come, not from action by a legislature, but from court decisions —from the application of reason to the settlement of actual controversies.

Legislative Machinery

While adequate machinery for the settlement of disputes is one of the first essentials in world organization based on law, it is not the only essential. There must also be adequate legislative machinery for bringing to bear the intelligence of mankind upon the settlement of international problems. There have been many of these growing out of the last World War and the post-war developments, and they will increase in number rather than diminish as time goes on and the life of the world grows more inter-related and complex—problems affecting international trade, travel and communication, problems arising out of the use of the air and the seas for the purposes of commerce, problems arising out of the exchange of goods and commodities, problems of international finance and credit, international labor problems, etc. The settlement of these cannot be left to the individual action of nations nor allowed to await the judicial action of courts or councils or arbitrators. Rules for their solution must in some way be laid down in advance by the legislative process; and this means that an assembly must be provided in which representatives of the constituent nations may be heard and may take action or make recommendations with respect to the problems that confront them.



John J. Parker

The Assembly of the United Nations provides just the sort of legislative assembly that the world must have; and it is no objection that it has not the power to enact laws by majority vote as does Congress or a state legislature. In the Assembly and in the Economic and Social Council the

world's problems are debated and explored in the view of all mankind, and world public opinion is formed with regard to them. When the adoption of new and binding rules is necessary, this can be accomplished by the negotiation of multilateral treaties based on the conclusions which have been reached in the Assembly with regard thereto.

Of tremendous importance is the functioning of commissions set up to make studies and recommendations as to matters which are important to the development of world life—commissions such as the International Law Commission, the International Labor Organization, UNESCO and others, which can and do make recommendations with respect to a myriad of matters many of which are entirely within the sphere of national control. Studies and recommendations with respect to education, labor conditions, currency stabilization and exchange, agricultural development, production and development of food and raw materials, public health and control of disease, regulation of the traffic in narcotics, etc.—recommendations of this sort are being made under the authority of the United Nations and are of the greatest value to the progress of mankind. While the United Nations does not attempt to exercise legislative power on the reports of these commissions, the reports serve as a basis of international agreements or legislation by the member countries. In this way, law grows by the legislative as well as by the judicial process for the preservation of peace and the betterment of living conditions throughout the world community.

Organization of Force

Our American Union furnishes fine illustration of co-operation for the purposes of collective security. No one of our states would be able to protect itself effectively against foreign aggression but collectively they possess a power that is today greater than that of any other nation in the world. This power is used to preserve the peace and enforce the law throughout the Union as well as to protect against dangers from without. Some such pooling of force for purposes of collective security and to enforce the rules of international law and the decrees of international tribunals is essential to the success of any international organization. Order rests upon reason and force. Force without reason is tyranny but reason without force to make it effective is anarchy. Most people will obey the rules of law willingly, but, unless others are forced to obey, the rules fall into disrepute. We do not expect peace in domestic affairs without force to preserve it; and it is idle to think that we can have peace in international relationships on any other basis. We did not leave Capone or Dillinger or Touhy to be dealt with by their victims, nor did we content ourselves with preaching sermons to them. We brought to bear the force of organized society and put an end to their criminal conduct. When Germany and Italy and Japan started out on a course of international brigandage, however, there was no adequate organization of the world's force to stop them. If the League of Nations had had such force available, Japan would never have dared invade Manchuria, Hitler would never have marched into the Rhineland, Mussolini would not have dreamed of seizing Ethiopia, and the great World War might never have come. And if the force had been available, there probably would have been no need to use it; for the mere presence of available force, without more, generally serves as a sufficient restraint upon those who would otherwise violate the law.

The great superiority of the United Nations over the old League of Nations is that in the Security Council we have a more effective pooling of the world's force for the preservation of world law and order. In Korea, in Suez and in many other situations its value has been amply demonstrated. We have reached the point, however, where there must be an even greater pooling of force for the purposes of collective security. Suez has demonstrated the importance of providing the United Nations with a police force and how such a force can be maintained. NATO has demonstrated the importance to the preservation of liberty and law of defense alliances for the purposes of collective security. The Organization of American States is another illustration of the pooling of force for collective security in the international field. It is not too much to hope that along these lines we will eventually be able to secure a pooling of the world's force for the preservation of the peace and the enforcement of law in the world community.

The establishment of a world order based on law is an undertaking fraught with great difficulties, as every great undertaking always is, but these must be approached realistically and with courage; and we are approaching them in that way. The veto power has prevented the use of world force as it might have been used for the maintenance of peace; but within the framework of the United Nations we are building defensive alliances like the North Atlantic Pact for the preservation of freedom under law. If that pact had been in existence at the time of the seizure of Czechoslovakia, that outrage, in all probability, would not have occurred. We have been faced with the intransigence of Russia; but the presence of Soviet representatives in the United Nations has enabled Russia to get the full impact of the powerful public opinion of the world, and the indications are that this is beginning to have its effect and Russia is evidencing at least an apparent willingness to co-operate with other nations for the establishment of peace. If Russia is willing to co-operate, world organization for peace will be a thing of the immediate future. If she is unwilling to go along with us, she will eventually get out or be put out of the United Nations; and thus freed from her opposition, we should proceed to strengthen the organization among the nations that remain, making it a defensive alliance of the free nations as well as an instrumentality for preserving law and order among men.

Order in human affairs can be achieved only by organization and such organization must be commensurate with the life for which peace and order is desired. Organization which was sufficient for the tribe or the state is not sufficient for the larger world community. That community must be

organized on the basis of world law and it is being so organized through the structure of the United Nations. We should rally to the United Nations, therefore, with confident hope and firm purpose that it shall succeed. For myself I feel that it is succeeding. It has not brought the millenium, of course, but I shudder to think what might have happened to the civilization of the world if it had not been in existence. It has, at least given us over the years since the ending of the war a world forum in which the desperate problems threatening the peace and safety of mankind have been brought out into the light where we could see them and take measures for their solution. It has set up an international court for the juridical settlement of international disputes, which has had its compulsory jurisdiction accepted by the most powerful nations now existing. It has effected a certain pooling of the world's force which has preserved a measure of peace in Israel and Indonesia, has brought the free nations of the world to the defense of the liberties of Korea, and has prevented the outbreak of war over Suez.

We are told that the League of Nations failed and that the United Nations must go the way of the League. I do not accept either premise. The League was a good beginning and it accomplished a very great deal. It brought sixty-three of the seventy-three nations of the world together around a common conference table; it found solution for many troublesome international problems; it brought into being the World Court; it furnished the world the best example that it had had up to that time of how to govern conquered territory; it unquestionably averted a number of wars; and who can say what it might or might not have accomplished if American statesmen like Root and Baker and Hughes had sat in its councils and this great, rich and powerful nation had given it unstinted support in the stormy years following the first world war?

Rome was not built in a day; our own Federal Union required many years in coming to maturity; and I have an abiding faith that, given proper support, the United Nations will grow in power and influence with the passage of time and will eventually give us a stable world order based on law and embodying the fundamental principles of human freedom. The forces of science and commerce have brought the world to the position where its life must be given unity. It is unthinkable that the strife and conflict which have attended recent years should continue. If unity is not achieved on the basis of reason and law, it will eventually be achieved through force; and the only hope of defeating those who would unify the world on the basis of force is for those who believe in the reign of law to rise above the narrow limitations of nationalism and support an intelligent organization of world life based upon law and righteousness.

This, if I may repeat, is the challenge that comes to the lawyers of today. May we go forward together, not merely today and tomorrow, but in all the years that lie ahead, leading the free world towards the attainment, not merely of world order, but of world order based on law and on those eternal principles of human liberty which are the chief glory of the Western World.

West Point Award

At a ceremony of the plain at West Point, New York, during the presentation of military and academic awards to members of the United States Corps of Cadets, Cadet George W. P. Walker was awarded the annual prize presented by the American Bar Association to the cadet standing first in law. The prize this year consisted of two sets of books, Beveridge's *The Life of John Marshall* and Pusey's *Charles Evans Hughes*. The presentation was made on behalf of the Association by Colonel Thomas H. King, U.S.A.F.R., of Washington, D. C. Cadet Walker is a native of Brooklyn, New York, and entered the Military Academy directly from high school.

Cadet Walker was commissioned a second lieutenant of Armor on June 4, 1958, and will report for duty at Fort Knox, Kentucky, following his graduation leave.



A Degree by Degrees:

A Comparison of Law Schools of 1920 and 1958

by Claude W. Dudley • *of the District of Columbia Bar*

Mr. Dudley is in a unique position to compare the training of today's law students with that of their fathers. He received his law degree this summer, nearly forty years after his original entry into Georgetown University Law School in September, 1919. Since he is a seasoned lawyer, his first-hand view of modern legal education is particularly interesting.

I entered Georgetown University Law School in September, 1919, and received my LL.B. degree in June, 1958. I hasten to add that I have not been there continually throughout the thirty-nine intervening years. Upon removal to Chicago in February, 1921, I discontinued formal study at that time. I continued informal studies, however, and, after returning to Washington and passing the District of Columbia bar examination, was admitted to the Bar there in 1925. I have been in the active practice of law in the District of Columbia for thirty-three years. When an opportunity presented itself in 1956 for me to be relieved of practically all of my duties with my firm, I decided to re-enter Georgetown Law School and work for a degree.

The justification for this article, if any, lies in the possibility that one who has had the unusual experience of attending law school as an undergraduate immediately after World War I and then again more than a decade after World War II may have some reflections on conditions in the law school at these different times which might be of some general interest.

Perhaps the greatest single change in the interim is the advent of women into the school. The 1919 Catalogue stated unmistakably that "the law school is not co-educational". Women were not admitted to Georgetown Law School until 1951, which was thirty-one years after the adoption of the Nineteenth Amendment. That the interval was so long may be somewhat indicative of the conservatism in the profession and its schools. The women have brought some keen competition; one of them in my class is No. 4 out of 186 students.

This is only one of many important changes for the better which have occurred. Great strides have been made in improving the instruction, the caliber of students and the tools.

Today's Law Students Are Better

To those of my brethren who think that the students in law school today do not measure up to the standards of their day, let me suggest that they go back to law school and try to keep up with them. My class standing in 1919 was very high; in 1956 it was relatively low. This was true despite the fact that I did more studying in 1956 than in 1919, according to the testimony of my wife who has an excellent memory for such things. At the end of the 1956-57 scholastic year, I inquired of myself why my then current standing should be so low. Why should one with thirty years of experience be unable to compete successfully with those who had had no such experience?

Needless to say, in my analysis I was looking for reasons other than lack of gray matter, and I think that I found at least some.

I found that my training in my practice did not help me much in the law school. In the practice, my job has been to be an advocate or a counselor. In presenting any matter to a court, an administrative official, or a client, I have always tried to reduce the issue to its narrowest possible limits and to concentrate on a direct approach to the heart of the case. Even at the risk of oversimplification I have always avoided collateral, subordinate and conditional approaches unless they were absolutely essential to an understanding of the case.

I did not find, however, that law professors were at the time of examination in any subject much interested in a demonstration of my ability or lack of ability as an advocate or counselor. They were interested in a demonstration of my knowledge of all the phases of the problem presented in the examination question. They wanted



Ace Photo

Claude W. Dudley received his B.S. (in economics) from the University of Pennsylvania in 1916. He attended Georgetown Law School from 1919 to 1921, was admitted to the Bar of the District of Columbia in 1925, and has since practiced in Washington. In 1956, he re-entered Georgetown Law School to work for the LL.B. which he received this June.

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an answer more in the nature of a court's opinion than an advocate's brief; they wanted an analysis of all of the facts, a statement of all of the issues, and a resolution of them only after a presentation of all of the pros and cons. In my answer to an examination question, the professor wanted me to apply to the facts of the particular problem the principles of law developed during the semester from the cases, the lectures and the class discussion.

I am not quarreling with this; I think that it is exactly as it should be. The professors realize all too well that the student may reach the right conclusion on most of the questions presented in the examination even though he has not mastered the material presented in the course. They are fearful for such a student. Conversely, if the student's discussion of the problems presented and the processes of reasoning which he has employed, as brought out in his answers, show that he has a good understanding of the principles of law developed throughout the course, the professor has some confidence in that student's ability to grapple with the practical problems which he will later face, even though some of his conclusions on the specific problems covered in the examination may be wrong.

I have also found that the habits acquired in my practice are not conducive to the best results in examinations in the law school. In my practice, I have usually had plenty of time to deliberate on the question before giving my answer. Generally speaking, my clients have been less interested in a quick answer than in the right answer. Consequently, my habits are deliberative. This has not been helpful in the law school examinations, for I know very well that I shall be expected to finish in three hours what would take me much longer than that if I should follow my usual methods; consequently, I "press". I try to change my accustomed speed of analysis with the same disastrous result that a golfer has when he speeds up his backswing.

Competition Today Is Keener

Another reason for my lower class standing in 1956 was that the competition was much keener then than in 1919. The requirement of an A.B. degree or its equivalent for entrance has made a big difference. In 1919 the catalogue stated that the requirement for admission was "a high school education or its equivalent, the equivalent, in each case, to be determined by examination". While there were students in my class in 1919 who were well prepared for the work required of them in the law school, many of whom have been very successful in the profession in later years, there were many others who were seriously deficient in preparation. Furthermore, I had a full-time job in 1919, as did most of the others in my class in the Evening School, and none of us could put the time on our studies which students in the Day School now spend.

Finally, although I dislike to admit it, I do not have and cannot get the same motivation that the young men have. They want a job on graduation; I do not. They know that prospective employers give primary consideration to their class standing and they strive to make that standing high. They are serious young men, many of whom are married and have children. Having these responsibilities, they strive to do well not only in their regular scholastic work but also in other activities, such as the law review, for employers seem to give preference to men engaged in such activities. Far into the night they study and discuss with other students the problems currently presented in the various courses; I close up shop before dinner.

Thoroughly dissatisfied with my record in the 1956-7 scholastic year, I undertook some self-analysis and also asked some of my classmates and professors for suggestions as to how I should change my methods. I also secured a copy of Kinyon's *How To Study Law and Write Law Examinations.* I have applied all of the suggestions gained from the several sources with some success, for my standing improved in the 1957-58 academic year.

Just as the students of 1958 have scholastic standards higher than those of 1919, so also do the professors have higher standards for them. This is exactly as it should be when we consider that the students are better prepared for their studies in the law school now than they were then. They should be required to meet higher standards. All of the professors whom I have encountered during the past two years are dedicated career men. While their methods differ a great deal one from the other, they are all earnestly trying to transmit a sound understanding of their respective subjects into the minds of a respectable percentage of the students, and they are willing to put forth real effort, extraordinary effort if you please, to accomplish that result. And I believe that they are accomplishing it.

The tools have also been improved tremendously since 1919. Not only does the library have a much larger number of books available for the students' use now than it had then, but also the character of the books used there and in the classroom has changed decidedly, and I think for the better. A

school which follows the case method does not have to be content with a mere casebook in its strict sense; the modern casebook has countless excerpts from statutes, editorial notes, and footnote references to cases, treatises, textbooks, law review articles and other material.

In fact, these are so numerous and so extensive that a student may well be discouraged by their very enormity. Furthermore, the use of other materials, including textbooks, loose-leaf services, and mimeographed outlines, to supplement the casebook is, I believe, far more extensive than it was in 1919.

Great as the improvement may have been, instruction is seriously handicapped at Georgetown, however, as it no doubt is at other schools, by the forced adoption of methods which are known not to be ideal. I suppose that all would agree that it is unfortunate that the grade for the entire course has to be based substantially on the grade in the final examination. This is unavoidable so long as financial considerations prevent small discussion groups. Perhaps the ideal would be for half of the time in any course to be devoted exclusively to lectures to a comparatively large group and for the other half to be devoted to round table discussion in very small groups of not more than ten students each, but the cost would be prohibitive.

Members of the faculty acting as student counselors do a great deal for individual students. Through the Legal Argument Program and in the National Moot Court Competition, sponsored by The Bar Association of the City of New York, in which Georgetown has had an outstanding record, the student's ability as an advocate is developed splendidly. But these activities do not fully compensate for the lack of classroom discussion in small groups.

That is the ideal and it is worth striving for. Certainly a grade based 50 per cent on the final examination and 50 per cent on the professor's appraisal of the student's over-all capabilities formed after close observation of his work in a very small group throughout the semester would be a better barometer of what to expect from the student than a grade based for the most part on the final examination. While the ability to think quickly under pressure is an important attribute of a successful lawyer, it is by no means the only one and there is little doubt that the present system gives it undue weight. Since those in charge of selecting young lawyers for employment by law firms, corporations and government agencies pay so much heed, perhaps too much, to class standing, some refusing even to consider those who are not in the top 10 per cent of the class, it seems clear that the effort in law schools should be to have that class standing reflect a composite appraisal by the professors of the student's over-all capabilities to a greater extent than is now possible.

This cannot be done under the circumstances today when the law schools are flooded with qualified applicants and direct teaching costs are high. To approach the ideal, tuition rates would become prohibitive. Law schools seem to be forced to rely on tuition for their support, rather than endowments and state and alumni aid, to a greater extent than other professional schools. When we consider the important part which lawyers are expected to play in public life and the influence which they are expected to wield, one might expect the law schools to be among the strongest from the standpoint of financial support, but that does not appear to be so.

I cannot close this article without reference to one thing which disturbs me greatly in a branch of the law in which I am especially interested, federal taxation. Some of the best students in law school today refuse to consider specializing in tax practice because of their inability to understand the Internal Revenue Code. They can get just as good jobs in other fields and they are taking them.

When classmates of mine have brought to me some of the provisions of the Code which have troubled them the most, I have often had to confess that I did not understand them either and have had to fall back on the Senate and House Reports for enlightenment. The countless artificial rules set up in the Internal Revenue Code are so confusing to the young student as to discourage him completely from entering the tax field. The enactment of a Tax Simplification Act is, in my opinion, even more important than was the complete revision and rearrangement of the Internal Revenue Code in 1954. It is my hope that my classmate of 1919, Colin F. Stam, Chief of Staff of the Joint Committee on Internal Revenue Taxation, will undertake to supervise such a job. He could not put any better finishing touch on a long and distinguished career in the public service.

The President's Page

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progress to achieve this goal? President Eisenhower in his "Law Day—U.S.A." address said:

> The world no longer has a choice between force and law; if civilization is to survive, it must choose the rule of law.

In a world sundered by differences of custom, culture, race, nationality and belief, only the law offers the common principles to which mankind can resort as a universally common idea and ideal from which a plan can be developed to achieve and maintain peace. As the nation at the forefront in government under law should we not be the leader who endorses and espouses a plan for peace under law?

We lawyers must achieve just as greatly here as have the scientists of the world in their field. "Law Day International" and an "International Law Year" could help give us that essential support of public opinion which is necessary to move toward the great goal of peace under law which all men should applaud.

Having thus illuminated some of the future possibilities in only one of the three objectives listed for "Law Day—U.S.A." in 1958, the initial question is rephrased thus: Shall we have a "Law Day" in 1959 and what should it emphasize?

Unauthorized Practice:

A Continuing Campaign in the Public Interest

by Melvin F. Adler • *of the Texas Bar (Fort Worth)*

Unauthorized practice is a problem that concerns lawyers primarily because only lawyers are in a position to understand just how dangerous the advice of lay "counselors" and non-lawyer "specialists" can be. And like every "good fight", the battle to keep the practice of law out of unskilled, often unscrupulous hands, never ends. Mr. Adler writes of the nature of this battle on these pages.

During the long fight to eliminate and stop unauthorized practice of law, the position of the organized Bar has oftentimes been misrepresented. The established public policy of our several states to prevent and punish unauthorized practice of law rests not upon selfish interests of lawyers, but upon the proposition that in the field of law, just as in the field of medicine, the public is entitled to protection. It is entitled to skillful, competent and disinterested advice from persons of character, qualified by prescribed courses of study, who by reason of their office are devoted disinterestedly to the person receiving their legal services. No employee of a corporation or layman pursuing a private business objective of his or its own can possibly qualify to give such disinterested advice, however expert he may represent himself to be in any specialized field.[1]

The relation between attorney and client is confidential in the extreme. The attorney is under all the obligations attached to a fiduciary relation and, above all things, he owes undivided loyalty to his client, unhampered by obligations to any other employer. These duties are enforced by the drastic remedy of disbarment proceedings, a measure outside of and in addition to other legal remedies. An attorney may not divulge confidential communications of his clients or the advice given thereon. It is obvious that the intervention of a corporation, the general employer of an attorney, between him and his client is destructive of this necessary and important relation. There can be no longer uninfluenced devotion to the client's interests. There exists along with and necessarily influencing the devotion to the client, the duty which the attorney owes to his general employer. Divided obligations in trust relations are obnoxious to the law and none more so than in that of attorney and client.[2]

Unauthorized practice of law is the attempt by laymen and corporations to make it a business for profit of giving the public, as a substitute, the services of unqualified and unprofessional persons or to employ and furnish for profit, directly or indirectly, the services of lawyers who may be willing to sabotage professional ethics in order to secure employment. In either case, the public is cheated either by receiving incompetent and unethical advice or being served by lawyers who are not disinterested, whose real client is not the person advised but the entrepreneur furnishing the services.[3]

It would be useless to establish high standards of morality for members of the profession if those who are not members, and therefore not bound by such canons, could practice the arts of the profession.[4]

Is it only in courts or in legal proceedings that danger lies from such evils? On the contrary, the danger there is at a minimum for very little can go wrong in a court where the proceedings are public and the presiding officer is generally a man of judgment and experience. Any judge of much active work on the bench has had frequent occasion to guide the young practitioner or protect the client from the haste or folly of an older one. It is not so in the office. Here the client is with his attorney alone without the impartial supervision of a judge. Ignorance and stupidity may here create damage which the courts of the land cannot thereafter undo.[5]

1. From Foreword by Edwin M. Otterbourg of the New York City Bar to the Compendium on Unauthorized Practice of the Law, published by the American Bar Association in 1942.
2. From *People* v. *Peoples Trust Company*, 167 N.Y.S. 767.
3. From *Bump* v. *District Court*, 5 N.W. 2d 914 (Iowa).
4. From *Hexter Title & Abstract Company* v. *Grievance Committee*, 179 S.W. 2d 946 (Texas).
5. From *People* v. *Alfani*, 125 N.E. 671 (N.Y.).

Lawyers' Advertising . . . An Intolerable Evil

Advertising and solicitation are forbidden to the lawyer. For, as Chief Justice Vanderbilt of New Jersey pointed out, "Advertising by any professional man inevitably involves self-praise and puffing. If competitive advertising among lawyers were permitted, the conscientious ethical practitioner would be inescapably at the mercy of the braggart."[6]

However, with the extension of social control, the law has imposed more and more restrictions and duties and as a result has transformed American life from a very simple set of legal problems into puzzling and variegated legal complexity. But the average American seldom realizes that many of his problems are legal ones. He is seldom told to look to his lawyer. On the other hand, he sees all around him eager hands stretched out to aid him, for a consideration. "Service" companies of many kinds, held back by no rules prohibiting advertising or solicitation, proclaim their special fitness for advising and representing him. And the public, generally being accustomed to vigorous solicitation and advertising with the sale of commodities, is often puzzled as to why a good doctor or good lawyer does not advertise just as a good automobile is advertised.[7]

A layman has recently written: "We have the feeling that many people—perhaps the majority—no longer find it necessary to use an attorney as family counselor. His place in many areas of family problems has, it seems, been taken by non-legal specialists, such as realtors, bankers, insurance agents, estate planners, Certified Public Accountants and others."

Another letter (from a different source) refers to " . . . the skills which lawyers do not have in sufficient quality or quantity, which deficiency often paves the way for non-lawyers' trespasses", and continues, "It seems to me that this second phase is one often understressed in discussion of unauthorized practice, for our system of legal education and also the legal profession bear some of the responsibility for unauthorized practice".

The writer would absolve our system of legal education from blame in this connection, for as many an attorney has discovered, no matter how thoroughly he has prepared himself or how great his efficiency, this won't bring clients into his office, when they are in the hands of a layman who tells them he can do the work as well as any lawyer and won't charge as much, or when they have been brought to the office of a corporation by its advertising or solicitation, or to the office of a layman who has been permitted to hold himself out as a "consultant" or "counselor" in the field of his alleged specialty.

If any blame is to be placed upon the legal profession, it must be for its failure to prosecute its campaign against unauthorized practice more vigorously and to educate the public. In both cases, undoubtedly the inhibition against advertising and solicitation has had a restraining influence.

It should also be noted that some lawyers have been aiding and profiting from unauthorized practice. Indeed, the creation in 1930 of the American Bar Association's Committee on Unauthorized Practice was on recommendation of the Committee on Professional Ethics and Grievances, which had become alarmed at the encroachment of illegal practitioners acting through and aided by lawyers.[8] And five years later, the Committee on Unauthorized Practice reported that much unauthorized practice would not exist but for lawyers participating and making it possible.[9]

In 1937, No. 47 was added to the Canons of Ethics of the American Bar Association as follows: "No lawyer shall permit his professional services or his name to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate."

Unauthorized Practice . . . What Is the Bar Doing?

What then, is the Bar doing to combat unauthorized practice directly, and on the other hand, to educate the public? Certainly, the Bar must work simultaneously in both directions. And obviously, the bulk of the work must be carried out by state and local committees. The American Bar Association has established separate committees on Unauthorized Practice and Public Relations. With respect to the former, the By-laws provide:

> This Committee shall keep itself and the Association informed with respect to the unauthorized practice of law by laymen and by agencies and the participation by attorneys in the latter, and concerning methods for the prevention thereof. The Committee shall seek the elimination of such unauthorized practice and participation by such action and methods as may be appropriate for that purpose, including cooperation with, and assistance and advice to state, district and local Bar Associations and other organizations.

In many cases, unauthorized practice by an individual is done unwittingly. In such cases, often a discussion of the matter with the offender by a local attorney or small committee is all that is required.

Others, however, will not desist until forced to by litigation. And through appellate court decisions, some dating back fifty years or more, a vast body of case law has been built up on the subject. See *Decennial Digest*, under Attorney and Client 11; A.L.R. under Attorneys, 1.7; and *Words and Phrases*, under Practice of Law, also Practicing Law. Reference should also be made to the September, 1951, issue of the *Unauthorized Practice News*, consisting of the "Study of Unauthorized Practice of Law", prepared for the Survey of the Legal Profession, by Edwin M. Otterbourg, of the New York Bar.

The *Unauthorized Practice News* has been published by the American Bar Association's Committee for over twenty years. Now published quarterly, it contains material of interest on decisions, pending cases, pleadings, joint agreements, papers, talks and the like. Until recently, it was distributed without charge to all interested attorneys, but as the cost of printing and distribution comes out of the appropriations for the Unauthorized Practice Committee, it has been found necessary to limit

6. *In re Rothman*, 97 A. 2d 621, 39 A.L.R. 2d 1032 (N.J.).
7. Adapted from monograph on UNAUTHORIZED PRACTICE OF LAW by John F. Onion, Jr., of the San Antonio, Texas, Bar.
8. 55 A.B.A. REP. 480.
9. 60 A.B.A. REP. 144.

free distribution to actual members of state and local committees and a few others, and to set up a system of paid subscriptions at $1.50 per year.

A number of years ago, the Standing Committee initiated the conference method of dealing with national organizations of business and professional groups. The result has been the adoption of Statements of Principles whereby certain areas of practice are defined within which the Bar, on the one hand, and the lay group, on the other, may operate without overstepping the boundaries of proper and acceptable practice. Such Statements of Principles have been adopted with collection agencies, insurance adjusters, banks with trust functions, publishers, realtors, certified public accountants, life insurance underwriters and life insurance companies. These Statements of Principles may be found in the third volume of Martindale-Hubbell. They have also been reprinted by Martindale-Hubbell in pamphlet form, copies of which can be obtained from the American Bar Association's headquarters at Chicago.

These Statements also aim at coordinating the joint skills of the Bar and the members of the other groups in those areas where their skills overlap. Under some of the agreements entered into, joint conferences are set up to settle and dispose of, without litigation, controversies and complaints which may arise between the groups. These preventive measures insure better public relations for all concerned and increase the usefulness of each of the parties in rendering the type of service which would best serve the public interest. The American Bar Association wishes to encourage state and local bar associations to organize conference groups at the local level to settle disputes as a part of the general program of each local bar association.[10]

The problem of education of the public is generally considered as under the jurisdiction of national, state and local public relations or public information committees. The task is by no means an easy one, but through cooperation between such committees and unauthorized practice committees, a beginning has been made. At this point, full tribute should be paid to the advertising by banks and trust companies, much of which of recent years has been directed to getting before the public the importance of the attorney in matters affecting estates, wills and trusts.

Most urgent, however, is the need for educating the lawyers themselves. Far too few understand what constitutes unauthorized practice, what can be done about it, what is being done, and why it is not only their right, but their duty, to do something about it.

Far too many lawyers look upon unauthorized practice as no more than minor acts committed by unwitting individuals. They are blind to the corrosive effect upon professional standards of the highly organized corporate practice now extant,[11] in which is included that of associations, clubs, trade unions, and other lay agencies offering legal services to members.[12] All this practice is carried on through licensed attorneys who permit their services to be controlled and exploited by such organizations, which, incidentally, are free to advertise and solicit.

A number of law schools, awakened to the danger, have begun to emphasize the obligations and responsibilities of the lawyer to his profession by making courses in legal ethics and unauthorized practice a requirement for graduation. This is a step of prime importance, for as education of the public must begin with that of the lawyer, that of the lawyer must begin with the law student.



Melvin F. Adler has practiced at Fort Worth since graduation from the University of Oklahoma Law School and admission to the Texas Bar in 1928. He has been identified with the unauthorized practice movement since 1940, when appointed to the first Grievance Committee to be organized for his district under the newly integrated State Bar.

10. From Foreword, by Thomas J. Boodell, of the Chicago Bar, Chairman of the American Bar Association's Standing Committee, to Martindale-Hubbell's 1956 reprint of the Statements of Principles.

11. See *Realism vs. Romanticism in the Philosophy of Illegal Practice* by Thomas F. Turley, Jr., of the Memphis Bar. UNAUTHORIZED PRACTICE NEWS, October, 1956, page 21.

12. See Informative Opinion #A in re employment by corporation or labor union of full-time lawyer to advise or assist employees or members on personal problems. 36 A.B.A.J. 477 (August, 1950), also at UNAUTHORIZED PRACTICE NEWS, October, 1950, page 43.

The Traffic Problem

(Continued from page 636)

"single purpose support group", dedicated to realistic traffic analysis and enforcement, designed to support the three enforcement agencies, the Police Department, the District Attorney and the Municipal Court.

Detroit has had such a single purpose support group for many years. It has been very successful in lowering the accident rate and in otherwise improving traffic conditions. Other cities are following suit as they find from bitter experience that, in metropolitan areas, the necessary public support can only come about with the assistance of such dedicated groups.

Fortunately, far-seeing civic-minded citizens are organizing such support groups in many cities. Lawyers, individually, are assisting. It is to be assumed that the organized Bar will, at the proper time, offer and lend its necessary aid.

It is my hope that the Organized Bar, as specialists in court matters, will have investigated the many problems confronting society in the administration of justice in the traffic court. Only in that way will the organized Bar be ready when the call comes.

Come it will.

AMERICAN BAR ASSOCIATION

Journal

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EDITORIAL OFFICES

1155 East 60th Street.....Chicago 37, Ill.

Signed Articles
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

Promoting Better Understanding

English, as it is spoken and understood in the United States of America, has undergone many material changes from the mother tongue as it is used in Great Britain today. In much the same way the common law, as it came to the Colonies from England, has likewise undergone many changes and alterations which distinguish it from the law as it exists in England today. However, by far the greatest differences in the political structures of the two countries are found in the constitutional forms of government under which both nations have grown great and established the principles of democracy firmly among the English-speaking peoples of the world. The people of both great nations are justly proud of their heritage of freedom and independence, as well as the democratic form of political structures which has made both possible. In this they share a common bond.

In practice the British idea of a constitutional government presents many differences and distinctions from that which has developed in the United States under our rigid constitutional limitations and restrictions. These differences and distinctions were discussed by a great student of both British and American government at the opening of the joint meeting of the American and British Bars in London last summer. The forum for this magnificent address was not included as a part of the official program. Before the opening session of the joint meeting the American Chamber of Commerce in London had arranged a luncheon, to which were invited as guests the leaders of the English and American Bar present in London. The principal speaker at this event was Sir Edwin Herbert, K. B. E., a Past President of the English Law Society and a frequent visitor to the United States, and an honorary member of our Association. Because of the fact that the luncheon of the American Chamber of Commerce was not listed as a part of the official proceedings, the speech of Sir Edwin was not included in the addresses heretofore published in the JOURNAL. It will be found elsewhere in this issue.

Every student of English and American government will find this address extremely worthwhile. We publish it for the further reason that to us it illustrates the main purpose of the joint meeting in London, which was to promote a better understanding between lawyers of the two great English-speaking countries.

The Wisdom of Settlements

"Justice delayed is justice denied" is an ancient maxim of the law. In recent years the glut of automobile accident cases in the courts has evoked a great deal of comment and several plans for remedial action. Compensation plans, abolition of the doctrine of contributory negligence and abandonment of jury trials in negligence cases are among the proposals offered. Pretrial conferences, modifications of court rules and scoldings from the bench have impressed upon lawyers the need for their co-operation in expediting justice in negligence cases.

Is the lawyer the real culprit?

A recent survey by George Gallup's American Institute of Public Opinion sheds a new light on this subject. In a coast-to-coast survey Americans were asked:

> If you had been hurt in an auto accident and were suing for damages, do you think you would collect more money if the case were tried before a judge or before a jury?

The vote across the country was as follows:

Before a judge.....16%
Before a jury.....58%
No difference..... 9%
Don't know.....17%

"The more lengthy process of the jury trial for routine accident damage suits", concluded the survey, "is preferred to a finding directly from the bench by a vote of more than 3-to-1." There is some reason, therefore, to conclude that

(Continued on page 680)



Henry F. Lippitt II, of Los Angeles, California, has called our attention to Kipling's poem on Runnymede and at his suggestion we are publishing it in this issue. The scene above shows the dedication a year ago of the Magna Charta Memorial, erected by the American Bar Association at the site of the granting of the Great Charter.

The Reeds of Runnymede
by Rudyard Kipling

Magna Charta, June 15, 1215

At Runnymede, at Runnymede,
What say the reeds at Runnymede?
The lissom reeds that give and take,
That bend so far, but never break.
They keep the sleepy Thames awake
With tales of John at Runnymede.

At Runnymede, at Runnymede,
Oh hear the reeds at Runnymede:—
"You mustn't sell, delay, deny,
A freeman's right or liberty.
It wakes the stubborn Englishry,
We saw 'em roused at Runnymede!

"When through our ranks the Barons came
With little thought of praise or blame,
But resolute to play the game,
They lumbered up to Runnymede;
And there they launched in solid line,
The first attack on Right Divine—
The curt, uncompromising 'Sign!'
That settled John at Runnymede.

"At Runnymede, at Runnymede,
Your rights were won at Runnymede!
No freeman shall be fined or bound,
Or dispossessed of freehold ground,
Except by lawful judgment found
And passed upon him by his peers.
Forget not, after all these years,
The Charter signed at Runnymede."

And still when Mob or Monarch lays
Too rude a hand on English ways,
The whisper wakes, the shudder plays,
Across the reeds at Runnymede.
And Thames, that knows the moods of kings,
And crowds and priests and suchlike things,
Rolls deep and dreadful as he brings
Their warning down from Runnymede!

Rudyard Kipling's Verse
Inclusive Edition—1885-1926
Hodder and Stoughton, Limited, London, 1927

American Bar Association:

Program for the Los Angeles Annual Meeting

The Assembly

First Session

Monday, August 25, 10:00 A. M.

Philharmonic Auditorium

THE PRESIDENT PRESIDING

Call to Order

Invocation, The Very Reverend David de L. Scovil, D.D., Dean of St. Paul's Cathedral

Addresses of Welcome

The Honorable Goodwin J. Knight, Governor of the State of California

The Honorable Norris Poulson, Mayor of the City of Los Angeles

E. Avery Crary, President of the Los Angeles Bar Association

Response

Joseph N. Welch, Boston, Massachusetts

Introduction of Distinguished Guests

Annual Address of the President, "World Peace Through Law"

Presentation of Awards of Merit to Bar Associations

Presentation of Awards of Merit to Cities Showing Greatest Improvement in Traffic Courts

Presentation of Resolutions

Seventeenth Annual Meeting of the American Bar Association Endowment, Jacob M. Lashly, President, St. Louis, Missouri

Announcement of Vacancies in Offices of State and Assembly Delegates

Nomination of Five Assembly Delegates for Three-Year Terms

Nomination and Election of Assembly Delegates to Fill Vacancies

Second Session

Wednesday, August 27, 10:00 A. M.

Pacific Ballroom, The Hotel Statler

THE PRESIDENT PRESIDING

Invocation, The Reverend Carroll L. Shuster, D.D., Executive Secretary of The Synod of California, Southern Area of the Presbyterian Church of the United States of America

Addresses by

The Honorable Arthur Kelly, Q.C., President of The Canadian Bar Association, "The Unimportance of Differences"

The Honorable William P. Rogers, Attorney General of the United States

Third Session

Thursday, August 28, 2:00 P. M.

Pacific Ballroom, The Hotel Statler

THE PRESIDENT PRESIDING

Invocation, Dr. Edgar F. Magnin, Senior Rabbi, Wilshire Boulevard Temple

Presentation of Ross Bequest Award for 1957

Rising Memorial to Former Presidents of the American Bar Association

Joseph W. Henderson, Philadelphia, Pennsylvania, 1943-1944

Guy A. Thompson, St. Louis, Missouri, 1931-1932

Addresses by

The Honorable Leslie E. Peppiatt, M.C., President of The Law Society, London, England, "Some Thoughts on the London Conference—and on English Solicitors"

The Right Honorable Sir Harry Hylton Foster, Q.C., M.P., Solicitor General of England, "The Lawyer and Democracy"

Consideration of Amendments to Constitution and By-Laws

Report of Committee on Resolutions, Hale McCown, Chairman, Beatrice, Nebraska

Fourth Session

Annual Dinner

Thursday, August 28, 7:30 P. M.

International Ballroom, The Beverly Hilton

THE PRESIDENT PRESIDING

Invocation, His Eminence James Francis Cardinal McIntyre, Archbishop of Los Angeles

Address (speaker to be announced)

Presentation of the American Bar Association Medal

Presentation of the First American Bar Association Public Service Awards to the Media of Information and Entertainment

Introduction of Incoming President

Fifth Session

Friday, August 29

Pacific Ballroom, The Hotel Statler

(Immediately following adjournment of the final session of the House of Delegates)

THE PRESIDENT PRESIDING

Report by the Chairman of the House of Delegates of Action upon Resolutions Previously Adopted by the Assembly

Action by the Assembly Upon Any Resolutions Previously Adopted by the Assembly but Disapproved or Modified by the House

Unfinished Business

New Business

Introduction of New Officers and Members of Board of Governors

Adjournment *sine die*

House of Delegates

The House of Delegates will meet in the Pacific Ballroom of The Hotel Statler, on Monday afternoon, August 25, at 2:00 P. M. and Tuesday, August 26, at 9:30 A. M. and 2:00 P. M., and Thursday and Friday, August 28 and 29, at 9:30 A. M.

Section Meetings

Administrative Law

The Ambassador

Saturday, August 23

12:30 P. M. Luncheon Meeting of Council

2:00 P. M. Meeting of Council and Committee Chairmen

Sunday, August 24

10:00 A. M. and 2:00 P. M. Meeting of Council and Committee Chairmen

Monday, August 25

2:00 to 3:15 P. M. General Session

Panel Discussion: "Government Contracts and Dispute and Appeal Proceedings"

Moderator: (To be announced)

Panel Members:

Bernard J. Gallagher, Chairman, Section Committee on Public Contracts, Washington, D. C.

Louis Spector, Member, Corps of Engineers, Board of Contract Appeals, Washington, D. C.

Frederick Sass, Jr., Counsel, Bureau of Aeronautics, Navy Department, Washington, D. C.

3:15 to 5:30 P. M.

Panel Discussion: "Influence in Federal Agency *Ex Parte* Proceedings—Should We Adopt a Code of Agency Ethics?"

Panel Members:

Honorable Clair Engle, Congressman from Second Congressional District of California

Honorable David W. Peck, former Justice of the Supreme Court of New York, New York, New York

Guy Farmer, former Member of National Labor Relations Board, Washington, D. C.

Leo A. Huard, Professor of Law, Georgetown University Law School, Washington, D. C.

Albert E. Stephen, Seattle, Washington

Tuesday, August 26

10:00 A. M. to 12:00 NOON General Session

Committee Reports

2:00 to 4:30 P. M.

General Session Committee Reports

4:30 to 5:00 P. M.

Election of Officers and Council Members

Section of Antitrust Law

The Ambassador

Monday, August 25

8:00 A. M. Breakfast Meeting of the Council

2:00 P. M. General Session, Herbert A. Bergson, Chairman, presiding

Report of Nominating Committee, Election of Officers and General Business Meeting

Subjects:

"Primary Jurisdiction—What It Is and What It Is Not"

"Types of Questions of Which Administrative Agencies Have Primary Jurisdiction"

"Types of Questions of Which Administrative Agencies Do Not Have Primary Jurisdiction"

(Speakers to be announced)

Tuesday, August 26

9:30 A. M. General Session, Herbert A. Bergson, Chairman, presiding

Subjects:

"A Critique of the Doctrine of Primary Jurisdiction"

"Procedural Problems in Connection with the Doctrine of Primary Jurisdiction"

"Collateral Enforcement of Antitrust Rules, Ideas or Notions"

(Speakers to be announced)

12:30 P. M. Luncheon, Herbert A. Bergson, Chairman, presiding

(Speaker to be announced)

Bar Activities

The Hotel Statler

Saturday, August 23

10:00 A. M. Meeting, Committee on Award of Merit

11:10 A. M. Client's Security Fund

Panel Discussion—Sponsored by the National Conference of Bar Presidents

Moderator:

Loyd Wright, Former President, American Bar Association, Los Angeles, California

Speakers:

Robert G. Storey, Former President, American Bar Association, Dallas, Texas

George S. Ray, Member, Special Committee on Client's Indemnity Fund, Dallas, Texas

Sunday, August 24

8:00 A. M. Council Breakfast Meeting

10:00 A. M. Meeting, Committee on Award of Merit

Sunday, August 24

Interpreting the Profession to the Public

National Conference on Bar Public Relations presented by the Standing Committee on Public Relations of

the American Bar Association under the auspices of the National Conference of Bar Presidents. The Section of Bar Activities of the American Bar Association, and the National Conference of Bar Secretaries, participating

12:30 P. M. Luncheon—"Screen and TV Portrayals of Lawyers and Courts", John Stone, Liaison Representative of the American Bar Association to the Television and Motion Picture Industries

2:00 P. M. Newspaper Columns

"Starting a Newspaper Column", Donald L. Martin, Director of Public Information, Illinois State Bar Association

"Keeping the Column Going and Extending Its Uses", James E. Sabine, Assistant Attorney General of California and Chairman of the Editorial Advisory Committee, State Bar of California

2:40 P. M. Publicizing Professional Discipline

"Handling Press Publicity About Disciplinary Actions", Berton J. Ballard, Director of Public Relations, State Bar of California

"Dealing With Special Problems of Adverse Publicity", Paul B. Comstock, Executive Director, The Florida Bar

3:20 P. M. Looking to the Future

"The Oregon Bar High School Program", Donald W. Morrison, Chairman, Oregon State Bar Committee on Public Service and Information

3:50 P. M. Public Information About Legal Fees and Services

"Minimum Fee Schedules, Their Public Informational Value", Samuel H. Morgan, Chairman, Committee on Fees and Law Office Management, Minnesota State Bar Association

"The Annual Legal Checkup", Hugh W. Brenneman, Public Relations Consultant, State Bar of Michigan

(NOTE: With respect to each subject, questions and comments will be invited from the floor)

Monday, August 25

2:00 P. M. General Session

The Lawyers' Economic Dilemma and What To Do About It

"Collar the Dollar—or Whee, the Fees!", A Demonstrative Skit

Speakers:

Luther Bang, Consultant to the American Bar Association Special Committee on Economics of Law Practice, Austin, Minnesota, "The Lawyer's Dilemma"

John C. Satterfield, Chairman, American Bar Association Special Committee on Economics of Law Practice, Yazoo City, Mississippi, "Causes and Cures"

Discussion

3:30 P. M. Electronic Retrieval Data—Can It Serve the Lawyer?

Speaker:

Richard F. C. Hayden, Chairman, Section Committee on Electronic Retrieval Data, Los Angeles, California

4:00 P. M. Business Meeting

Election of Officers

Corporation, Banking and Business Law

The Biltmore Hotel

Sunday, August 24

The Hotel Statler

9:30 A. M. Meeting of Council

Monday, August 25

2:00 P. M. Meeting of Section

Panel Discussion:

"Dangers Under Recent Federal Tax Lien Decisions—The Urgent Need for Federal Legislation To Protect the Property of Third Parties (such as mortgagees, sureties, materialmen, contractors, legal counsel, warehousemen, etc.)"

The discussion will include an explanation of what the general practitioner should know of the current status of the law on federal lien priorities.

The House of Delegates of the American Bar Association at its Midyear Meeting authorized the appointment of a Committee on Federal Liens to study this subject, including proposed legislation, and to report to the 1958 Annual Meeting of the House in Los Angeles. The discussion will also include an analysis of the report of this Committee, and the distinguished panelists are the Chairman and most of the members of the Committee, as follows:

Moderator:

Laurens Williams, Chairman of the American Bar Association Committee on Federal Liens and formerly Assistant to the Secretary of the Treasury and Head of the Treasury Legal Advisory Staff, Washington, D. C.

Panel Members:

Harold F. Birnbaum, Chairman of the Special Subcommittee on the Relative Priority of Liens of the Section of Corporation, Banking and Business Law, Los Angeles, California

David A. Bridewell, Chairman of the Committee on Savings and Loan Law of the Section of Corporation, Banking and Business Law, Chicago, Illinois

R. Emmett Kerrigan, Member of the Section of Insurance, Negligence and Compensation Law, New Orleans, Louisiana

Earl Q. Kullman, Chairman of the Committee on Relative Priority of Government and Private Liens of the Section of Real Property, Probate and Trust Law, New York, New York

Harry K. Mansfield, Secretary of the Section of Taxation, Boston, Massachusetts

William T. Plumb, Jr., Chairman of the Committee on Federal Tax Liens and Collection Proceedings of the Section of Taxation, Washington, D. C.

Daniel S. Wentworth, Chairman of the Committee on Accountability of Trustees of Charitable Trusts of the Section of Real Property, Probate

and Trust Law, Chicago, Illinois
Tuesday, August 26
9:30 A. M. Meeting of Council and Committee Chairmen
12:15 P. M. Luncheon Meeting of Section
Address by Arthur H. Dean, New York, New York
2:00 P. M. Meeting of Section
An Original Play—"The Voice of the Gavel"
A demonstration of the handling of practical and legal problems of creditors in dealing with an insolvent manufacturing corporation, including voluntary arrangement and subsequent Chapter XI proceedings
The cast includes:
The Honorable Norris Poulson, Mayor of Los Angeles
Benno M. Brink, Referee in Bankruptcy
Jerry Giesler, Los Angeles Bar
A. Ronald Button, California State Treasurer
Hubert F. Laugharn, former Referee in Bankruptcy
Annual Business Meeting of the Section
Tuesday, August 26
The Hotel Statler
4:30 P. M. Meeting of Council

Annual Meeting of the Division of Food, Drug and Cosmetic Law, Section of Corporation, Banking and Business Law

Tuesday, August 26
The School of Law
University of Southern California
University Park
9:30 A. M. Introductory Statements, Charles Wesley Dunn, Chairman, New York, New York; Edwin L. Harding, Secretary, Battle Creek, Michigan
Discussion of Federal Food, Drug, and Cosmetic Act
Honorable Gilbert H. Jertberg, United States District Judge, Southern District of California, Fresno, California
John L. Harvey, Deputy Commissioner of Food and Drugs, United States Department of Health, Education, and Welfare, Washington, D. C.
Arthur A. Dickerman, Western Counsel for Food and Drug Administration, United States Department of Health, Education, and Welfare, Los Angeles, California
Discussion of Federal Narcotic Law
H. J. Anslinger, United States Commissioner of Narcotics, Washington, D. C.
Discussion of Federal Meat Inspection Act
Dr. A. R. Miller, Director of Meat Inspection Division in Agricultural Research Service, United States Department of Agriculture, Washington, D. C.
Discussion of Canadian Food and Drugs Act
R. E. Curran, Q.C., Legal Adviser to Canadian Department of National Health and Welfare, Ottawa, Canada
2:00 P. M.
Papers on Food and Drug Law
Thomas W. Christopher, Associate Dean of the School of Law, Emory University, Atlanta, Georgia
Eugene M. Elson, Los Angeles, California
Tobias G. Klinger, Los Angeles, California
Wallace E. Sedgwick, San Francisco, California
Donald D. Stark, Corona, California
Floor Discussion
Unfinished Business
Note: The morning session will be followed by a common luncheon at The School of Law, University of Southern California

Criminal Law
The Biltmore Hotel

Monday, August 25
2:00 P. M. General Session, Arthur J. Freund, Section Delegate, presiding
Subject: "The Public Defender"
The pros and cons of providing public defender services for persons accused of crime
Moderator: Honorable William J. Brennan, Jr., Associate Justice, Supreme Court of the United States
Panel Members:
Honorable Edward J. Dimock, Judge of the United States District Court for the Southern District of New York
Colonel James C. Garnett, Office of the Judge Advocate General, United States Army
Ellery Cuff, Los Angeles County Public Defender
Committee Reports
Tuesday, August 26
10:00 A. M. General Session, Brigadier General Charles L. Decker, Assistant Judge Advocate General, United States Army, presiding
Subject: "Justice—For Whom?"
A discussion of the practical and ethical problems of trying accused persons in the criminal courts
"What Price Conviction?" Honorable Malcolm Anderson, Assistant Attorney General in charge of Criminal Division, United States Department of Justice
"What Price Acquittal?" Jerry Giesler, of the Los Angeles Bar
"What Price Justice?" Honorable Irving R. Kaufman, Judge of the United States District Court for the Southern District of New York
Committee Reports
2:00 P. M. Session Sponsored Jointly with the National Probation and Parole Association, Honorable James V. Bennett, Vice Chairman of the Section, and Honorable Bolitha J. Laws, member, Section Council, presiding
Subject: "Verdict Guilty—Now What?"
A discussion of problems affecting the convicted offender
"Institutional Treatment", Austin H. McCormick, Professor of Criminology, University of California
"Probation, Parole and Pardon", Honorable George Edwards, Judge of the Michigan State

Supreme Court, Lansing, Michigan
"Community Attitudes *vis-à-vis* the Offender", Dr. Karl Menninger, Topeka, Kansas

Election of Officers

New Business

Family Law

The Biltmore Hotel

Sunday, August 24

10:00 A. M. Organization Meeting of Section. Honorable Godfrey L. Munter, Chairman, Special Committee To Investigate the Advisability of a Section of Family Law, presiding

Adoption of By-Laws Approved by Board of Governors of American Bar Association in Atlanta, February, 1958

Election of Council

2:00 P. M. Round Table Discussions on Work and Scope of the Section

Monday, August 25

8:00 A. M. Council Breakfast Meeting
Committee Appointments and Assignments

2:00 P. M. General Session
Speaker:
The Right Reverend James A. Pike, Bishop Coadjutor of the Episcopal Diocese of California, "Religious and Ethical Perspectives on Family Law"

Tuesday, August 26

10:00 A. M. General Session
Speaker:
Honorable Orman W. Ketcham, Judge of Juvenile Court for the District of Columbia, "Individualized Justice in Juvenile Courts"

Reports of Committee Chairmen on Work and Scope

2:00 P. M. Panel Discussion
Speaker:
Honorable Louis H. Burke, Judge of the Conciliation Court of Los Angeles County

Insurance, Negligence and Compensation Law

The Ambassador

Sunday, August 24

12:00 NOON Meeting and Luncheon, Officers, Members of the Council and Committee Chairmen

Monday, August 25

8:00 A. M. Breakfast Meeting, Committee on Automobile Insurance Law

12:00 NOON Luncheon, L. J. Carey, Chairman, presiding
Guest Speaker:
Cecil B. de Mille, Hollywood, California

2:00 P. M. General Session, L. J. Carey, Chairman, presiding
Committee on Automobile Insurance Law, George E. Allen, Chairman, Richmond, Virginia
"Compensation Without Fault"
Speakers:
P. L. Thornbury, Columbus, Ohio
Leo S. Karlin, Chicago, Illinois
Edward P. Gallagher, Indianapolis, Indiana
George McDormit Schlotthauer, Madison, Wisconsin

4:00 P. M. Committee on Fidelity and Surety Insurance Law, Charles C. Howell, Jr., Chairman, Jacksonville, Florida
"Liquidated Damages in Construction Contracts"
Newton E. Anderson, Los Angeles, California
"Joint Ventures"
Joe Crider, Jr., Los Angeles, California

Tuesday, August 26

8:00 A. M. Breakfast Meetings:
Committee on Fire Insurance Law and Committee on Marine and Inland Marine Insurance Law
Committee on Life Insurance Law, Committee on Health and Accident and Committee on Regulation of Insurance Companies
Committee on Trial Tactics and Committee on Rules and Procedure
Committee on Fidelity and Surety Insurance Law
Committee on Casualty Insurance Law and Committee on Workmen's Compensation and Employer's Liability Insurance Law

9:30 A. M. General Session, L. J. Carey, Chairman, presiding
Joint Program presented by the following committees:
Nuclear Energy Insurance, DeRoy C. Thomas, Chairman, New York, New York
Workmen's Compensation and Employers' Liability Insurance Law, John R. Dixon, Chairman, St. Louis, Missouri
Casualty Insurance Law, E. G. Poxson, Jr., Chairman, Detroit, Michigan
"The Impact of the Atom on Liability and Insurance"
Moderator: Honorable F. Britton McConnell, Commissioner of Insurance for the State of California, Los Angeles, California
"The Problem of Protection Against Atomic Hazards", Arthur W. Murphy, New York, New York
"The Atomic Age and Workmen's Compensation", Edmund D. Leonard, San Francisco, California
"Medical Aspects of Hazards from Atomic Energy and Its By-Products", Dr. L. H. Garland, San Francisco, California
"Tort Liabilities Flowing from the Atomic Hazard", E. Blythe Stason, Dean, University of Michigan Law School, Ann Arbor, Michigan

2:00 P. M. General Session, L. J. Carey, Chairman, presiding

Business Meeting

Reports of Officers and Committees on Membership, Publications and Los Angeles Arrangements

Election of Officers, Council Members and Section Delegate to the House of Delegates

2:30 P. M. Committee on Aviation Insurance Law, Suel O. Arnold, Chairman, Milwaukee, Wisconsin
"Aviation in the Age of Nuclear Energy", George Gore, Northrup Field, Hawthorne, California

3:15 P. M. Joint Program presented by:
Committee on Fire Insurance Law, Francis Van Orman, Chairman, Newark, New Jersey
Committee on Marine and Inland Marine Insurance Law, John M. Aherne, Chairman, New York, New York
"The Impact of the Atom on Property and Marine Insurance",
Moderator: James B. Donovan, New York, New York
Panelists:
Ambrose B. Kelly, Providence, Rhode Island
J. Raymond Berry, New York, New York
Louis W. Niggeman, San Francisco, California

6:30 P. M. Reception—Cocktails:—All Section Members Attending Dinner Dance

7:30 P. M. Dinner Dance and Entertainment

Wednesday, August 27

8:00 A. M. General Section Breakfast, L. J. Carey, Chairman, presiding
(Speaker to be announced)

Thursday, August 28

9:30 A. M. General Session, L. J. Carey, Chairman presiding
Committee on Trial Tactics, Charles E. Pledger, Jr., Chairman, Washington, D. C.
"Whiplash Injuries, The Legal and Medical Aspects"
Moderator: Honorable Clarence B. Runkle, Judge of the Superior Court, Los Angeles, California
Panelists:
John Lewis King, San Bernardino, California
Dr. Harold E. Crowe, Los Angeles, California

11:00 A. M. Committee on Life Insurance Law, John V. Bloys, Chairman, New York, New York
"Federal Taxation and Life Insurance", Kenneth Martin Worthy, Washington, D. C.

11:45 A. M. "A London Lawyer Looks Back at the 1957 London Conference"
Sir William Charles Crocker, M.C., London, England

12:15 P. M. Business meeting
Presentation of New Officers, Council Members and Section Delegate to the House of Delegates
Unfinished Business
New Business
Adjournment

International and Comparative Law

The Biltmore Hotel

Sunday, August 24

10:00 A. M. Meeting of Council

12:15 P. M. Council Luncheon

2:00 P. M. General Session
Committee Reports
New Business

Tuesday, August 26

8:00 A. M. Joint Breakfast with the American Foreign Law Association, Edward D. Re, Chairman, Brooklyn, New York, presiding
William B. Stern, Co-Chairman, Los Angeles, California, representing American Foreign Law Association
Speaker: Eugene D. Bennett, San Francisco, California. "A Comparison of Foreign and United States Antitrust Legislation"

9:30 A. M. General Session
Committee Reports
New Business

12:15 P. M. Annual Joint Luncheon with Junior Bar Conference, Homer G. Angelo, Chairman, Section of International and Comparative Law, and Bert H. Early, Chairman, Junior Bar Conference, jointly presiding
(Speaker to be announced)

2:00 P. M. Symposium on Missiles, Satellites, and Outer Space
(Speakers to be announced)

4:30 P. M. Meeting of New Officers and Council

5:45 to 7:00 P. M. Reception in Honor of Distinguished Foreign Guests, sponsored by the Inter-American Bar Association in Co-operation with the Section of International and Comparative Law of the American Bar Association and the International Bar Association

Junior Bar Conference

The Biltmore Hotel

Friday, August 22

9:00 A. M. Meeting of Board of Directors

9:00 A. M. Meeting of Award of Merit Judges

1:30 P. M. Meeting of Executive Council

6:30 P. M. Reception

Saturday, August 23

8:30 A. M. Continental Buffet Breakfast

9:00 A. M. First General Session of Membership, Bryce M. Fisher, National Secretary, presiding
Summary of Annual Meeting Activities: Richard F. Alden, Chairman, Annual Meeting Committee
Announcement of Appointments to:
Nominating Committee
Resolutions Committee

9:30 A. M. Organizational Meeting of Conference Assembly
Call to Order: Bert H. Early, National Chairman
Election of presiding officer and clerk
Adoption of rules of procedure
National Chairman's Report
Report of Junior Bar Conference Delegate to American Bar Association House of Delegates
Reports of selected Junior Bar Conference Committees

12:00 NOON Luncheon, Kirk McAlpin, National Vice Chairman, presiding

Invocation

Speaker: Charles A. Phelan, President, Junior Barristers Section, The Canadian Bar Association, Montreal, Quebec

1:30 P. M. Continuation of Meeting of Conference Assembly

Presentation of Delegates' Program

(This meeting is a workshop session designed to bring to the attention of the delegates workable ideas and programs selected from outstanding junior bar organizations on a nation-wide basis. C. Cullen Smith, Chairman of the Delegates Program Committee, will be in charge.)

5:00 P. M. Circuit Caucuses

For Conference Assembly Delegates from the states comprising the 2d, 4th, 6th, 8th and 10th Federal Judicial Circuits and the states comprising the 9th and 10th Circuits-at-Large

The Beverly Hilton

7:00 P. M. Reception tendered by the Los Angeles Bar Association

8:00 P. M. Annual Dinner Dance

Sunday, August 24

1:00 P. M. Committee Meetings:
Nominating Committee
Resolutions Committee
Award of Merit Judges

Monday, August 25

12:00 NOON Luncheon, Bert H. Early, National Chairman, presiding

Invocation

Speaker: The Honorable Stanley N. Barnes, Judge, United States Court of Appeals for the Ninth Circuit

Introduction of Past Chairmen of Junior Bar Conference

2:00 P. M. Second General Session of Membership, Bert H. Early, National Chairman, presiding

Reports: Award of Merit Judges
Resolutions Committee
Circuit Chairmen on Caucuses
Nominating Committee
Balloting for National Officers

4:00 P. M. Annual Debate and Reception Sponsored by the Conference on Personal Finance Law

Debate Participants:
James J. Bierbower, Washington, D. C.
James M. Ballengee, Philadelphia, Pennsylvania
Edward E. Murphy, Jr., St. Louis, Missouri
Robert H. Geffs, Janesville, Wisconsin

Tuesday, August 26

10:00 A. M. Meeting of Newly Elected Officers and Council

12:15 P. M. Annual Joint Luncheon with Section of International and Comparative Law, Homer G. Angelo, Chairman, Section of International and Comparative Law, and Bert H. Early, Chairman, Junior Bar Conference, jointly presiding

(Speaker to be announced)

Judicial Administration

(All meetings at The Hotel Statler unless otherwise indicated)

Saturday, August 23

12:00 NOON, returning 6:00 P. M. Cruise and Luncheon Aboard a United States Navy Aircraft Carrier

Chief Justices of the States, Federal Judges, Board of Governors of the American Bar Association, and Section members invited (ladies included). For reservations write to Mr. Justice Clark, Supreme Court of the United States, Washington 25, D. C. Reservations limited.

Sunday, August 24

10:00 A. M. Meeting of Committee on Scope and Program

2:00 P. M. Meeting of Council

Monday, August 25

12:30 P. M. Annual Luncheon Honoring Federal and State Judges

2:00 P. M. Tasks of the Trial Judge

Honorable Robert G. Simmons, Chief Justice, Supreme Court of Nebraska, presiding

State trial judges meet to effect the organization of a national program for the study of problems common to all states

Monday, August 25

Biltmore Theatre

2:00 P. M. Law and the Layman

Honorable Bolitha J. Laws, Chief Judge, United States District Court for the District of Columbia, presiding

A program where citizens, judges and lawyers meet for the purpose of improving the administration of justice.

Keynoter: Honorable J. Edgar Hoover, Director, Federal Bureau of Investigation

Panel Members:

Honorable Phil E. Gibson, Chief Justice of the Supreme Court of California

Honorable William C. Mathes, United States District Judge for the Southern District of California

Honorable Louis H. Burke, Judge of the Superior Court of Los Angeles County, California

(Additional panel members to be announced)

Monday, August 25

6:30 P. M. Reception (invitational)

7:30 P. M. Annual Dinner in Honor of the Judiciary

Addresses by:

Honorable William P. Rogers, Attorney General of the United States

Honorable John R. Dethmers, Chief Justice of the Supreme Court of the State of Michigan and Chairman of the Conference of Chief Justices

Songs by Jeanette MacDonald, Renowned Musical Star

Music by the United States Marine Corps

Tuesday, August 26

Biltmore Theatre

10:00 A. M. Traffic Court Program

A program jointly sponsored by President Eisenhower's

Committee for Traffic Safety, the California Federation of Traffic Safety Foundation, Greater Los Angeles Safety Council, the American Bar Association Special Committee on Traffic Court Program and the Section of Judicial Administration

Subject: "Traffic Court Problems from a National Standpoint"

(Keynoter to be announced)

11:00 A. M. Workshops Covering Various Aspects of the National Traffic Problem

Alexandria Hotel

12:30 P. M. Traffic Court Program Luncheon

Biltmore Theatre

3:00 P. M. Traffic Court Program Continued

Address: Theodore S. Petersen, President, Standard Oil Company of California

Workshop Reports Received

The Biltmore Hotel

5:00 P. M. Reception for Traffic Court Program Registrants

Tuesday, August 26

10:00 A. M. Uniform Jury Instructions in Civil Cases

Honorable Philbrick McCoy, Judge of the Superior Court of Los Angeles County, California, presiding

"What You Should Know About BAJI: The Preparation and Use of Uniform Jury Instructions in Civil Cases"

The Panel:

Honorable Arnold Praeger, Judge, Superior Court of Los Angeles, *Chairman*

Honorable Paul Nourse, Judge, Superior Court of Los Angeles

Honorable Julius V. Patrosso, Judge, Superior Court of Los Angeles

Stevens Fargo, Los Angeles Bar

Samuel A. Rosenthal, Los Angeles Bar

Observer Members of Panel:

Honorable Robert G. Simmons, Chief Justice, Supreme Court of Nebraska

Honorable Emory H. Niles, Chief Judge, Supreme Bench of Baltimore

Gerald C. Snyder, Illinois Bar

2:00 P. M. Uniform Rules of Evidence

Program jointly sponsored by the American Bar Association Special Committee on Uniform Evidence Rules for Federal Courts and the Section of Judicial Administration

Ben R. Miller, Chairman, Committee on Uniform Evidence Rules for Federal Courts, presiding

Participants:

Honorable Joe E. Estes, Dallas, Texas

Honorable Spencer A. Gard, Iola, Kansas

Charles W. Joiner, Ann Arbor, Michigan

John C. Pryor, Burlington, Iowa

Charles L. Carr, Kansas City, Missouri

Thursday, August 28

10:00 A. M. Meeting of Section Honoring State Committees

Annual Report of Chairman

Address:

"Purpose and Operation of State Committees and Their Importance in Section Activities", Honorable Leslie L. Anderson, Minnesota District Court, Minneapolis, Minnesota

"The Nation—Judicial Administrationwise" by Chairmen of State Committees

Special Reports by:

Honorable Spencer A. Gard, of Kansas

Daniel J. Reidy, of New York

Dean Daniel J. Dykstra, of Utah

Robert W. Graham, of Washington

Labor Relations Law

The Ambassador

Saturday, August 23

2:30 P. M. Council Meeting

Sunday, August 24

10:00 A. M. Council Meeting

Monday, August 25

2:00 P. M. General Session

Committee Reports:

Membership, John W. Morgan, Chairman, Boston, Massachusetts

Education in Labor Relations Law, Robert E. Mathews, Chairman, Professor of Law, Ohio State University, Columbus, Ohio

Labor Law Periodicals and Publications, Harry P. Jeffrey, Chairman, Dayton, Ohio

Improvement of Administration of Union-Employer Contracts, John L. Waddleton, Chairman, Milwaukee, Wisconsin

Analysis of Recent United States Supreme Court Decisions Affecting Labor Relations Law, Archibald Cox, Professor, Harvard University Law School, Cambridge, Massachusetts

Presentation of Film on Arbitration, Paul M. Herzog, Executive Vice President, American Arbitration Association, New York, New York

Tuesday, August 26

10:00 A. M. General Session

Committee Reports:

The Lawyer's Role in Improving the Processes of Collective Bargaining, Paul S. Kuelthau, St. Louis, Missouri; Ivar H. Peterson, Cincinnati, Ohio, Co-Chairmen

Legal Services, Guy O. Farmer, Washington, D. C.; C. Paul Barker, New Orleans, Louisiana, Co-Chairmen

Federal Labor Standards Legislation, Frederick R. Livingston, New York, New York; Sidney G. Handler, Harrisburg, Pennsylvania, Co-Chairmen

State Labor Legislation, Ida Klaus, New York, New York; Donald H. Wollett, Seattle, Washington, Co-Chairmen

12:30 P. M. Luncheon: Honoring Members and General Counsel of the National Labor Relations Board

Speaker:
Honorable Philip Ray Rodgers, Acting Chairman, National Labor Relations Board, Washington, D. C.

2:00 P. M. General Session

Report of Committee on National Labor Relations Act, Frederic D. Anderson, Indianapolis, Indiana; Mathew O. Tobriner, San Francisco, California, Co-Chairmen

General Debate on Committee Recommendations

Report of Committee on Labor Arbitration, William J. Barron, New York, New York; Alfred Kamin, Chicago, Illinois, Co-Chairmen

General Debate on Committee Recommendations

Report of Committee on National Labor Relations Board Practice and Procedure, Harry S. Benjamin, Jr., Detroit, Michigan; Plato E. Papps, Washington, D. C., Co-Chairmen

Proposed Resolutions for Consideration by House of Delegates

Report of Nominating Committee

Election of Officers and Members of Council

5:00 P. M. Reception through the courtesy of Bureau of National Affairs, Inc.

Legal Education and Admissions to the Bar

JOINT SESSION WITH

National Conference of Bar Examiners

The Hotel Statler

Saturday, August 23

2:00 P. M. Meeting of Section Council

Sunday, August 24

10:00 A. M. and 2:00 P. M. Meeting of Section Council

Monday, August 25

2:00 P. M. Joint General Session, Sharp Whitmore, Chairman, National Conference of Bar Examiners, Los Angeles, California, presiding

Report of Chairman of National Conference of Bar Examiners and Appointment of Nominating Committee

Report of the Bar Examination Service Committee, John T. DeGraff, Chairman, Albany, New York

Panel Discussion on the Mechanics of Giving a Bar Examination

Moderator: Fred M. Mock, Chairman, Oklahoma Board of Bar Examiners, Oklahoma City, Oklahoma

Panel Members:

John B. Hendricks, Secretary, Illinois Board of Law Examiners, Springfield, Illinois

E. Marshall Thomas, Member, Iowa Board of Law Examiners, Dubuque, Iowa

Panel Discussion on Requesting and Using Character Information from the National Conference of Bar Examiners

Moderator: Sharp Whitmore, Chairman, National Conference of Bar Examiners, Los Angeles, California

Panel Members:

Fred M. Mock, Chairman, Oklahoma Board of Bar Examiners, Oklahoma City, Oklahoma

Marjorie Merritt, Director, National Conference of Bar Examiners, Denver, Colorado

Forrest E. Macomber, Incoming Chairman, California Committee of Bar Examiners, Stockton, California

5:00 P. M. National Conference of Bar Examiners Cocktail Party

Tuesday, August 26

10:00 A. M. Joint General Session, Sharp Whitmore, Chairman, National Conference of Bar Examiners, Los Angeles, California, presiding

Report of the Joint Committee on Standards, Dr. Shelden D. Elliott, Chairman of the Committee, and Secretary of the Section Council, New York, New York

Panel Discussion on Proper Bar Examination Coverage

Moderator: Olin E. Watts, Past Chairman of the Conference and Member of the Section Council, Jacksonville, Florida

Panel Members:

"From the Bar Examiner's Point of View"

Ira Butler, Chairman, Texas Board of Law Examiners, Ft. Worth, Texas

Thomas H. Adams, Member, Michigan Board of Law Examiners, Detroit, Michigan

"From the Law School's Point of View"

George Neff Stevens, Dean, University of Washington School of Law, Seattle, Washington

John Ritchie, III, Dean, Northwestern University School of Law, Chicago, Illinois

Report of Nominating Committee and Election of Officers of the National Conference of Bar Examiners

12:15 P. M. Joint Luncheon—National Conference of Bar Examiners and the Section of Legal Education and Admissions to the Bar

Speaker: Albert J. Harno, Dean, University of California School of Law at Los Angeles, "Preparation for Law—How Prepare and for What?"

2:00 P. M. Joint General Session

Herbert W. Clark, Chairman, Section of Legal Education and Admissions to the Bar, San Francisco, California, presiding

Appointment of Nominating Committee, Section of Legal Education

Report of the Adviser to the Council of the Section of Legal Education: John G. Hervey, Oklahoma City, Oklahoma

Panel Discussion on the Alleged Subversive Applicant—His Rights and Obligations

Moderator: Peter H. Holme, Jr., Vice Chairman of the Section, Denver, Colorado

Panel Members:

Honorable Raymond S. Wilkins, Chief Justice of the Supreme Judicial Court of Massachusetts, Boston, Massachusetts

Archibald Cox, Professor, Harvard University Law School, Cambridge, Massachusetts

Samuel J. Kanner, Chairman, Florida Board of Law Examiners, Miami, Florida

Report of Nomination Committee and Election of Officers of Section of Legal Education
(Two members of the Council, and nominee to serve on the American Bar Association-American Law Institute Joint Committee of Twenty-two on Continuing Legal Education)

Mineral and Natural Resources Law

The Hotel Statler

Sunday, August 24

4:00 P. M. Meeting of Council and Committee Chairmen

Monday, August 25

2:00 P. M. General Session, Robert E. Lee Hall, First Vice Chairman, presiding

Opening Remarks of the Chairman

2:00 to 4:00 P. M. Committee on Water Rights, John Shaw Field, Chairman, Reno, Nevada

Addresses:

"Water Rights—Surface and Underground", Burnham Enersen, former President of the Bar Association of San Francisco, San Francisco, California

"Federal Encroachment on State Water Rights", Clarence A. Davis, former Solicitor and Under Secretary, Department of the Interior, Washington, D. C.

Panel Discussion and Question-and-Answer Period conducted by Members of Committee on Water Rights

Panel Members:

Calvin A. Behle, Salt Lake City, Utah
Clifford E. Fix, Twin Falls, Idaho
Raphael J. Moses, Alamosa, Colorado
Fred E. Wilson, Albuquerque, New Mexico
Booth Kellough, Denver, Colorado

Committee on Coal, Hamilton K. Beebe, Chairman, Chicago, Illinois

Addresses:

"Activities of the Chief Counsel of the Internal Revenue Service", Arch M. Cantrall, Chief Counsel of the Internal Revenue Service, Clarksburg, West Virginia

"Problems of the Coal Intervenor in Federal Power Commission Proceedings", Jerome J. McGrath, General Counsel of Fuels Research Council, Inc., Washington, D. C.

Tuesday, August 26

8:30 A. M. Breakfast Meeting of the Atomic Energy Committee

10:00 A. M. General Session, Raymond B. Holbrook, Chairman, presiding

Committee on Public Lands, Howard M. Gullickson, Chairman, Denver, Colorado

Address:

"Some Current Problems in Resources Law", Elmer F. Bennett, Solicitor, Department of the Interior, Washington, D. C.

Committee on Atomic Energy, Francis L. Kenney Jr., Chairman, St. Charles, Missouri

Addresses:

"State's Rights and Atomic Energy", John M. Dalton, Attorney General of Missouri, Jefferson City, Missouri

"Profit Possibilities in the Mining and Milling of Uranium", Dr. Paul Henshaw, Manager of Exploration, Homestake Mining Company, San Francisco, California

Committee on Hard Minerals, William G. Waldeck, Chairman, Montrose, Colorado

Address:

"Capital Highlights on Hard Minerals", Julian D. Conover, Executive Vice President, American Mining Congress, Washington, D. C.

2:00 P. M. General Session, Robert T. Patton, Second Vice Chairman, presiding

2:00 to 4:00 P. M. Committee on Natural Gas, Paul F. Schlicher, Chairman, New York, New York

Addresses:

"Impact of Recent Legal Decisions and Administrative Actions on the Natural Gas Industry", Paul F. Schlicher, The Texas Company, New York, New York

"Current Regulatory Problems Affecting Natural Gas Companies Under the Natural Gas Act", Frederick Stueck, Vice Chairman, Federal Power Commission, Washington, D. C.

Committee on Oil, George W. Hazlett, Chairman, Cleveland, Ohio

Addresses::

"Well Spacing—A Reappraisal", Robert M. Williams, Phillips Petroleum Company, Bartlesville, Oklahoma

"The California Subsidence Bill", Richard C. Bergen, Los Angeles, California

Committee Reports and Election of Officers

Wednesday, August 27

4:00 P. M. Meeting of Council

Municipal Law

The Biltmore Hotel

Sunday, August 24

2:00 P. M. General Session, Charles B. Howard, First Vice Chairman, presiding

Reports and Recommendations of Committees

Discussion

5:00 P. M. Meeting of Council

Monday, August 25

2:00 P. M. General Session, George F. B. Appel, Chairman, presiding

Annual Report of Chairman

Appointment of Nominating Committee

2:30 P. M. Charles B. Howard, First Vice Chairman, presiding

Reports and Recommendations of Committees

Discussion

Tuesday, August 26
10:00 A. M. General Session, George F. B. Appel, Chairman, presiding
Addresses:
"The Development of Special Districts in California", Charles C. Cooper, Jr., Counsel for the Metropolitan Water District of Southern California
"The Seattle Story", James R. Ellis, Seattle, Washington
12:30 P. M. Luncheon, James L. Beebe, Chairman of Host Committee, presiding
Introduction:
Honorable Norris Poulson, Mayor, City of Los Angeles
Speaker:
Roger Arnebergh, City Attorney, Los Angeles, California
2:30 P. M. General Session, George F. B. Appel, Chairman, presiding
Addresses:
"California's Metropolitan Zoo or The Saga of Home Rule and Contractual Cross Breeding in the Golden State", Honorable Leon Thomas David, Judge, Appellate Department of the Superior Court, Los Angeles, California
(Additional address to be announced)
Report of Nominating Committee
Election of Officers and Members of Council
New Business
Adjournment
5:00 P. M. Meeting of Council

Patent, Trademark and Copyright Law

The Biltmore Hotel

Friday, August 22
8:00 P. M. Meeting of Council and Committee Chairmen

Saturday, August 23
10:00 A. M. Symposium on Copyrights
Moderator: Cedric W. Porter, Boston, Massachusetts
Uses of Titles for Copyrighted and Public Domain Works: Samuel W. Tannenbaum, New York, New York
Status of Proposed Revisions of the Copyright Law: Abraham L. Kaminstein, Washington, D. C.
Parody and Burlesque of Copyrighted Works as Infringements: Herman F. Selvin, Los Angeles, California
Related Rights: Joseph S. Dubin, Universal City, California

Saturday, August 23
2:00 P. M. Symposium on Patents
Moderator: James M. Naylor, San Francisco, California
Subject: Discussion re Single Court of Patent Appeals
Speakers:
In favor—Honorable Walter L. Pope, Judge, United States Court of Appeals, Ninth Circuit
Honorable Joseph R. Jackson, Judge, United States Court of Customs and Patent Appeals, Retired
Against—W. D. Keith, New York, New York
(Additional speaker to be announced)
The Hotel Statler
6:00 P. M. Reception Tendered by Los Angeles Patent Law Association
Sunday, August 24
Catalina Island, Hotel St. Catherine
12:15 P. M. Luncheon, United States Trademark Association (Speaker to be announced)
2:00 P. M. Symposium on Trademarks
Moderator: Walter J. Halliday, New York, New York
Subject: Discussion of Proposed Changes in the Lanham Act
Speakers:
John T. Love, Chicago, Illinois
Stewart W. Richards, New York, New York
Leslie D. Taggart, New York, New York
6:30 P. M. Dinner

Monday, August 25
8:00 A. M. Breakfast, National Council of Patent Law Associations
1:30 P. M. General Session
Reports of Committees
Address by: Honorable Robert C. Watson, Commissioner of Patents

Tuesday, August 26
9:30 A. M. General Session
Election of Officers and Members of Council
Reports of Committees
12:30 P. M. Luncheon, International Patent and Trademark Association (A.I.P.P.I.)
2:00 P. M. General Session
6:30 P. M. Reception Tendered by Los Angeles Patent Law Association
7:30 P. M. Annual Section Dinner

Thursday, August 28
9:30 A. M. General Session
Reports of Committees
Unfinished Business
New Business
12:30 P. M. Council Meeting Luncheon

Public Utility Law

The Ambassador

Sunday, August 24
11:00 A. M. Meeting of Council

Monday, August 25
2:00 P. M. General Session, Randall J. LeBoeuf, Jr., Chairman, presiding
Report of Chairman of Standing Committee To Survey and Report as to Developments During the Year in the Field of Public Utility Law, C. William Cooper, Vice President and General Counsel, Consolidated Natural Gas Company, New York, New York
Topic: Utility Regulation

Addresses:

"Some Aspects of Transportation Regulation"—Howard G. Freas, Chairman, Interstate Commerce Commission

"Some Aspects of Electric Utility Regulation in California"—Peter E. Mitchell, President, Public Utilities Commission of California

"Some Aspects of Telephone Regulation"—George R. Perrine, Chairman, Illinois Commerce Commission

Tuesday, August 26

10:00 A. M. General Session, Randall J. LeBoeuf, Jr., Chairman, presiding

Topic: Role of Private Industry and Government in the Nuclear Power Program

Addresses:

"Role of the Electric Industry in the Nuclear Power Field"—Herbert Cohen, Vice President and General Counsel, American Gas & Electric Company, New York, New York

"Accounting Problems Arising Under State Regulation of Companies Participating in Atomic Energy Projects"—Harvey A. Fischer, Michigan Counsel for Detroit Edison Company, Detroit, Michigan

11:00 A. M. Clarence H. Ross, Chairman of Program Committee, presiding

Topic: Natural Gas Problems

Addresses:

"Problems Created by *Memphis, Sierra* and *Mobile* Decisions"—William S. Tarver, General Attorney, Southern Natural Gas Company, Birmingham, Alabama

"Canadian Natural Gas Situation and Its Bearing on Import, Export Problems"—Harry S. Welch, American Counsel, Trans-Canada Pipe Lines, Limited, Dallas, Texas

12:30 P. M. Luncheon Meeting for Council Members and Guest Speakers

2:00 P. M. General Session, John B. Prizer, Vice Chairman of Section and Vice President and General Counsel, Pennsylvania Railroad Company, Philadelphia, Pennsylvania, presiding

Topic: Regulatory Problems Arising in Connection With the Adjustment of Rail Passenger Service

Addresses:

"From the Public Standpoint"—Robert W. Ginnane, General Counsel, Interstate Commerce Commission

"From a Railroad Standpoint"—Charles W. Burkett, Jr., General Attorney, Southern Pacific Company

Topic: The Conflict in and Self-destruction of Federal Policies in the Field of Small Parcel Transportation

Address:

William B. Johnson, Assistant General Counsel, Pennsylvania Railroad Company

New Business

Report of Nominating Committee

Election of Officers and Members of Council

7:00 P. M. Cocktail Party

8:00 P. M. Dinner Dance

Wednesday, August 27

12:30 P. M. Luncheon Meeting of Council

Real Property, Probate and Trust Law

The Ambassador

Sunday, August 24

10:00 A. M. Meeting of Council

Monday, August 25

8:00 A. M. Breakfast Meeting of Council

Joseph Trachtman, Chairman, New York, New York, presiding

1:45 P. M. Appointment of Nominating Committee and General Business Session

2:00 P. M. Probate Law Division:

J. Pennington Straus, Director of Probate Division, Philadelphia, Pennsylvania, presiding

Probate Division Committee Reports

2:15 P. M.

"Rights of Personal Representatives To Breach Executory Contracts of Decedents", Lewis M. Simes, Ann Arbor, Michigan

3:00 P. M.

"Survivorship Purchase Agreements and Taxes", George J. Laikin, Milwaukee, Wisconsin

3:45 P. M. Panel Discussion: "Tax, Probate and Other Tribulations of the Non-Resident Resident"

Participants:

Louis M. Brown, Los Angeles, California
Richard H. Forster, Los Angeles, California
Sidney D. Krystal, Los Angeles, California

4:30 P. M. Adjournment of Session

Tuesday, August 26

8:00 A. M. Breakfast Meeting of Officers, Members of Council, and Chairmen and Members of Committees (Coffee Bar at 7:30 A. M. for early arrivals)

9:30 A. M. Real Property Law Division:

Paul E. Basye, Director of Real Property Division, Burlingame, California, presiding

"Limiting the Effect of Recitals as to Unrecorded Instruments", Albert B. Wolfe, Boston, Massachusetts

10:15 A. M. Panel Discussion: "Rights of a Surviving Spouse in Estate of a Non-Native California Decedent"

Participants:

"Background of California Code Revisions", Brent M. Abel, San Francisco, California

"Function and Effect of the New California Legislation", Harold Marsh, Jr., Los Angeles, California

"Protection Against Inter Vivos Transfers", A. Stevens Halsted, Jr., Los Angeles, California

"Effect upon Estate, Inheritance and Gift Taxes", Charles J. Barry, San Francisco, California

12:00 NOON Adjournment of Session

2:00 P. M. Annual Meeting of Section:

Joseph Trachtman, Chairman, New York, New York, presiding

Election of Officers

2:15 P. M. Trust Law Division:

Carl F. Schipper, Jr., Director of Trust Division, Boston, Massachusetts, presiding

"Estate and Tax Planning", Harrison F. Durand, New York, New York

"Buy-Sell Agreements", A. Richard Kimbrough, Los Angeles, California

"Life Insurance Settlement Options", Harry S. Redeker, Philadelphia, Pennsylvania

"Support Trusts—Gifts of Securities to Minors", Eustace W. Tomlinson, New York, New York

"Manners and Customs of a Boston Trustee", Charles P. Curtis, Boston, Massachusetts

3:45 P. M. Panel Discussion: "Comparing the Manners and Customs of Trustees on the Pacific Coast and Elsewhere with Those of a Boston Trustee"

Participants:

Charles P. Curtis, Boston, Massachusetts
Otho G. Lord, Los Angeles, California
Richard C. O'Connor, San Francisco, California
Joseph Trachtman, New York, New York

4:30 P. M. Adjournment of Session

Huntington-Sheraton Hotel, Pasadena

7:00 P. M. Annual Reception and Dinner in the Pool Terrace and Gardens. Hawaiian Luau (dinner) with Hawaiian atmosphere and music.

(Bus transportation will be furnished)

Wednesday, August 27

8:00 A. M. Breakfast Meeting of Council

Taxation

The Hotel Statler

Thursday, August 21

9:00 A. M. and 2:00 P. M. Meeting of Officers and Council (Executive Session)

Friday, August 22

9:00 A. M. and 2:00 P. M. Meeting of Council and Committee Chairmen

Saturday, August 23

9:00 A. M. Business Session, Lee I. Park, Chairman, presiding

Report of Chairman

Reports of Committees

2:00 P. M. Business Session, Lee I. Park, Chairman, presiding

Reports of Committees

Saturday, August 23

Bel-Air Bay Club, Pacific Palisades

7:30 to 9:00 P. M. Reception

EIGHTH ANNUAL DINNER

Hawaiian Motif (Informal)

RICHARD H. FORSTER, CO-CHAIRMAN,
LOS ANGELES MEETING, PRESIDING

9:00 P. M. to 1:00 A. M. Dinner and Dancing

Sunday, August 24

9:00 A. M. Business Session, William R. Spofford, Vice Chairman, presiding

Reports of Committees

1:00 P. M. Luncheon, Austin H. Peck, Jr., Co-Chairman Los Angeles Meeting, presiding

Speaker: Honorable William J. Jameson, United States District Judge for the District of Montana, and former President of the American Bar Association, "The Relationship of Lawyers and Certified Public Accountants in Federal Tax Practice Under the Draft of the Code of Conduct"

2:00 P. M. Business Session, William R. Spofford, Vice Chairman, presiding

Reports of Committees

Monday, August 25

2:00 P. M. Business Session, Lee I. Park, Chairman, presiding

Report of Nominating Committee, William A. McSwain, Chairman, Chicago, Illinois

Election of Officers and Council Members

Unfinished Committee Reports

Unfinished Business

New Business

Tuesday, August 26

10:00 A. M. Technical Session, Arthur Manella, Los Angeles, California, presiding

Subject: "Tax Problems of the Independent Motion Picture and Television Producer"

Panel Members:

(Names to be announced)

2:00 P. M. Special Session on State and Local Taxes, George D. Brabson, Chairman, presiding

Report of Subcommittee on Simplification of Multi-State Income Taxation, Arthur D. Rich, Chairman, Aiken, South Carolina

Paper on Severance Taxes, with special emphasis on offshore oil and gas production. Review in light of recent decisions of the U. S. Courts of Appeals in severance cases, Dr. Arthur Lynn, Department of Economics, Ohio State University

Two-part discussion and debate on the subject "Does the Tax Structure of a State Appreciably Influence the Location of New Industries", James H. Maloon, Chief, Division of Research, Ohio Department of Taxation; and George D. Brabson, Tax Attorney, The Ohio Oil Company

Proposed Amendments to the Constitution and By-Laws

I.

Notice is hereby given that Sylvester C. Smith, Jr., of Newark, New Jersey; Stuart B. Campbell, of Wytheville, Virginia; Osmer C. Fitts, of Brattleboro, Vermont; Lewis C. Ryan, of Syracuse, New York, and John C. Satterfield, of Jackson, Mississippi, members of the Association and members of the Committee on Rules and Calendar, and Joe C. Barrett, of Jonesboro, Arkansas; Martin J. Dinkelspiel, of San Francisco, California; Allan H. W. Higgins, of Boston, Massachusetts; Edward G. Knowles, of Denver, Colorado, and Frederic M. Miller, of Des Moines, Iowa, members of the Association and members of the Committee on Scope and Correlation of Work, have filed with the Secretary of the Association the following amendments to the Constitution and By-Laws of the Association:

(A) *Creation of office of President-Elect*

(a) Amend the Constitution, Article VII, Section 1, by inserting in present line 3 thereof after the words "the Chairman of the House of Delegates," the words, "the President-Elect"; so that the second sentence of Section 1 will read:

"The Board shall consist of the President, the Chairman of the House of Delegates, *the President-Elect*, the last retiring President, the Secretary, the Treasurer and the Editor-in-Chief of the American Bar Association Journal, all of whom shall be members ex officio, together with one member from each federal judicial circuit who shall be elected as hereinafter provided."

(b) Amend the Constitution, Article VIII, Section 1, by inserting in the first line after the word "President", the words "President-Elect"; by inserting in line 2 after the words "shall be elected", the words "by the House of Delegates"; by deleting the words "of the House of Delegates" in lines 2 and 3 and in lines 6 and 7; by deleting present lines 8 and 9, "A President, who shall not thereafter be eligible for election to that office"; and inserting in lieu thereof: "A President-Elect who shall become President of the Association upon the adjournment of the next succeeding annual meeting; and shall not thereafter be eligible for the office of President"; and adding to the end of the section the statement "In the year 1959, there shall be elected a President, who shall not thereafter be eligible for election to that office." Section 1 will then read as follows:

"Section 1. *President, President-Elect, Secretary and Treasurer.* The following officers shall be elected *by the House of Delegates*, at each annual meeting by a majority vote of those present and voting, and shall serve for the year beginning with the adjournment of the annual meeting at which they are elected and ending with the adjournment of the next annual meeting:

A President-Elect who shall become President of the Association upon the adjournment of the next succeeding annual meeting; and shall not thereafter be eligible for the office of President;

A Secretary; and

A Treasurer.

In the year 1959, there shall be elected a President, who shall not thereafter be eligible for election to that office."

(c) Amend the Constitution, Article VIII, Section 2, by inserting in line 3 after the words "shall be elected" the words "by the House of Delegates"; by eliminating from line 4, and line 9 the words "of the House of Delegates"; and by eliminating from lines 4 and 5 the words "beginning in 1944". Section 2 will then read as follows:

"Section 2. *Chairman of the House of Delegates.* A Chairman of the House of Delegates, chosen from the membership of the House of Delegates, shall be elected *by the House of Delegates* at the Annual Meeting in even-numbered years by a majority vote of those present and voting, and shall serve for the term of two years beginning with the adjournment of the annual meeting at which he is elected and ending with the adjournment of the second following annual meeting. He shall not thereafter be eligible for election to that office."

(d) Amend the Constitution, Article VIII, Section 3, by eliminating present Section 3 and inserting in lieu thereof the following:

"*Vacancies.* If any office *other than that of President or President-Elect* shall become vacant, the office shall be filled by the Board of Governors, for the remainder of the term. *If the office of President shall become vacant, the President-Elect shall thereupon become President of the Association for the unexpired term. Such service shall not affect such person's becoming President of the Association upon the adjournment of the next annual meeting. In the event the office of President-Elect shall become vacant, the State Delegates shall convene at the call of the Board of Governors and nominate a successor and the House of Delegates shall elect a successor at its next meeting. In the event that the office of President becomes vacant at a time when the office of President-Elect is also vacant, the Board of Governors shall fill the office of President for the remainder of the term.*"

(e) Amend the Constitution, Article IX, Section 1, by substituting in line 5 thereof for the word "President", the words "*President-Elect*", and by adding to the end of the first paragraph, in line 17 thereof, the words "*At such meeting held in the year 1959 the State Delegates shall make a nomination for the office of President.*"

(f) Amend the Constitution, Article IX, Section 2, by substituting in line 7 thereof for the word "President" the words "*President-Elect*", and by inserting

in line 23 a sentence: *Additional nominations for President may be made in accordance with these provisions in the year 1959.*"

(g) Amend the By-Laws, Article VIII, Section 1, by adding at the end thereof the following:

"*The President-Elect shall perform such duties as may be assigned to him by the President of the Association. In case of the disability of the President to perform his duties or his absence from any meeting of the Assembly, the Board of Governors or the House of Delegates, the President-Elect shall perform the duties of the President during the continuance of such disability or absence.*";

and by eliminating Sections 2 and 3 and renumbering present Section 4 as Section 2.

(B) *Inclusion of Chairman of Conference of Chief Justices as member of the House of Delegates*

Amend the Constitution, Article VI, Section 3, by inserting a new line following present line 27 to read:

"*The Chairman of the Conference of Chief Justices;*"

and by eliminating lines 28 and 29, "The President, the Chairman of the House of Delegates, the Secretary and Treasurer of the Association".

(C) *Election of Assembly Delegates*

Amend the Constitution, Article IV, Section 3, by inserting in line 2 thereof, after the words "the Assembly shall elect", the words "by printed or written ballot"; by inserting a new sentence in present line 4: "Any ballot on which the number of votes cast is more or less than the five Assembly Delegates to be elected shall be void"; and by striking out in line 5 the words "vote of the Assembly for a term which" and inserting in lieu thereof the words "of the votes cast. The term". Section 3 will then read as follows:

"Section 3. *Assembly Delegates.* At each annual meeting the Assembly shall elect by *printed or written ballot* five members of the Association as Assembly Delegates to the House of Delegates, no two of whom shall be residents of the same State. *Any ballot on which the number of votes cast is more or less than the five Assembly Delegates to be elected shall be void.* Election shall be by a plurality *of the votes cast. The term* shall commence at the adjournment of the annual meeting at which such delegates are elected, and shall expire at the adjournment of the third annual meeting following their election. If an Assembly Delegate shall resign, the office of such delegate shall be deemed to be vacant. If an Assembly Delegate shall fail to register in attendance before the convening of the first session of the Assembly at the annual meeting, the office of such delegate shall be deemed to be vacant for the particular meeting, and the Assembly shall elect an interim successor to serve for that particular annual meeting; but if such Assembly Delegate shall fail to register in attendance before the convening of the first session of the Assembly at the succeeding annual meeting, then his office shall be declared to be vacant and a successor shall be elected by the Assembly to serve for the remainder of such term."

(D) *Representation of state and local bar association delegates*

Amend the Constitution, Article VI, Section 6, by striking out in line 6 thereof the words "one thousand" and substituting in lieu thereof the words "twelve hundred and fifty"; by striking out in line 7 thereof the words "have more than four" and substituting in lieu thereof the words "be entitled to more than five"; by striking out in line 8 the words "eight hundred" and substituting in lieu thereof the words "one thousand"; by striking out in line 9 the words "twenty-five" and substituting the word "thirty"; by striking out in line 11 the word "purposes" and substituting the word "activities"; by inserting in line 12 after the words "or related principally," the words "to social or library activities or"; by changing the period in line 19 to a semicolon and inserting thereafter the words "provided, however, that such reduction shall not reduce the number of delegates to less than two State Bar Association delegates, where the State Bar Association is entitled to five delegates."; by striking out in lines 21-26 the words "He shall serve for a term of two years and until his successor shall have been certified; provided, however, that the terms of all State and local Bar Association delegates which would otherwise continue after the adjournment of the Annual Meeting of this Association in 1940, shall end at the adjournment of said meeting. Thereafter" and by striking out in line 27 the word "end" and substituting therefor the words "be for two years ending". Lines 1-28 of Section 6 will then read as follows:

"Section 6. *Selection of State Bar and Local Bar Association Delegates.* Each State Bar Association shall be entitled to at least one delegate in the House of Delegates. State Bar Associations in States which have in excess of two thousand lawyers shall be entitled to one additional delegate for each additional *twelve hundred and fifty* lawyers above such two thousand; provided, however, that no State Bar Association shall *be entitled to more than five* delegates. Any local Association having *one thousand* or more members in good standing, *thirty* percent of whom are members of the American Bar Association, shall be entitled to one delegate; provided that the *activities* of such local Association are not limited, or related principally, *to social or library activities or* to a specialized field of law, and that such Association is comprised predominantly of members of the Bar who reside or have an office within a single city, county, or other political subdivision within a State. When a State Bar Association is entitled to additional delegates, the number of such additional State Bar Association delegates shall be reduced by the number of delegates elected by local bar associations within such State; *provided, however, that such reduction shall not reduce the number of delegates to less than two State Bar Association delegates, where the State Bar Association is entitled to five delegates.* Each State and local Bar Association Delegate shall be chosen in such manner as such Association shall determine. The terms of such delegates shall *be for two years ending* at the adjournment of the annual meeting in even numbered years."

(E) *Representation of delegates from affiliated organizations*

Amend Article VI, Section 8, of the Constitution by adding in line 4, after the words "legal profession", the words "whose objectives and activities are not embraced in the activities of the Association or any Section thereof and"; by adding in line 4, after the words "having individual membership", the words "of one thousand or more members"; by striking out the words "twenty-five" in line 5 and inserting in lieu thereof the word "fifty"; by adding in line 9, before the comma after the word "select", the words "one delegate"; by changing the comma in line 10 to a period; by striking out, in lines 10 to 16 the words "one delegate, who shall thereupon become a member of the House of Delegates for a term of one year and until his successor shall have been certified. The term of any delegate succeeding any such delegate shall begin with the adjournment of the annual meeting following his selection, and shall end with the adjournment of the next annual meeting thereafter.", and substituting in lieu thereof the words "the term of such Delegate shall be for two years ending at the adjournment of the annual meeting in odd-numbered years."; and by adding a new paragraph at the end of the section as follows: "The House of Delegates shall have power to adopt rules for the administration of this provision. Any affiliated organization approved by and represented in the House of Delegates prior to the 1957 Annual Meeting, and which continues to have fifty percent of its members who are members of the American Bar Association shall continue to be entitled to a delegate." Article VI, Section

8, will then read as follows:

Section 8. *Delegates from Affiliated Organizations of the Legal Profession.* The American Law Institute, the American Judicature Society, and any other national organization in the legal profession, *whose objectives and activities are not embraced in the activities of the Association or any Section thereof and* having individual membership *of one thousand or more members* and having *fifty* percent of its members who are members of the American Bar Association, and which shall be approved by the House of Delegates as an organization to be represented in the House of Delegates through affiliation with the American Bar Association, may, upon such approval, select *one delegate*, in such manner as such organization shall determine. *The term of such delegate shall be for two years ending at the adjournment of the annual meeting in odd-numbered years.* In the event of the resignation, disqualification or death of any such delegate, the organization which he represents may select and certify a successor to serve for the balance of the delegate's unexpired term.

The House of Delegates shall have power to adopt rules for the administration of this provision. Any affiliated organization approved by and represented in the House of Delegates prior to the 1957 Annual Meeting, and which continues to have fifty percent of its members who are members of the American Bar Association, shall continue to be entitled to a delegate.

(F) *Effective time of amendments*

(a) Amend Article XII of the Constitution by adding at the end thereof the words:

Unless otherwise provided, an amendment shall become effective at the adjournment of the Annual Meeting at which the same is adopted."

(b) Amend Article XIII of the Constitution by adding at the end thereof the words:

"*Unless otherwise provided, an amendment shall become effective at the adjournment of the annual meeting at which the same is adopted; except that upon referendum the same shall become effective upon certification of adoption by the Board of Elections.*"

(G) *Creation of Standing Committee on Constitutional Law*

Amend Article X of the By-Laws, by striking out line 6, of Section 6 "Bill of Rights," and inserting a new line after present line 9, to read "Constitutional Law."

Amend Article X, Section 7, by striking out subsection (d), Bill of Rights, and by inserting a new subsection following present subsection (g) Communications, as follows:

"*Constitutional Law*: This Committee shall have jurisdiction to investigate and study all questions arising under the Constitution of the United States and amendments thereto. It shall consult with any Section or other Committee of the Association directly affected by or interested in such question. Unless otherwise ordered by the House of Delegates or Board of Governors, any public action to be taken by the American Bar Association on constitutional questions shall, after such consultation, be taken by this Committee, subject to the provisions of Article XII of the By-Laws."

(H) *Creation of Standing Committee on Traffic Court Program*

Amend Article X of the By-Laws by inserting in Section 6, immediately following present line 27, a new line, "Traffic Court Program"; and by inserting in Article X, Section 7 a new subsection immediately following present subsection (z) as follows:

"*Traffic Court Program.* This Committee shall supervise the Traffic Court Program of the Association; it shall have primary jurisdiction of any and all activities and programs within the Association relating to the administration of justice by courts with respect to traffic cases. The Committee shall have such further powers and duties as may be prescribed by the House of Delegates or Board of Governors."

(I) *Elimination of Standing Committee on Civil Service*

Amend Article X of the By-Laws by deleting from Section 6 line 7, "Civil Service", and by deleting from Section 7 present subsection (e), "Civil Service".

(J) *Elimination of Standing Committee on Coordination of Bar Activities*

Amend Article X of the By-Laws by deleting from Section 6 line 10, "Coordination of Bar Activities", and by deleting from Section 7 present subsection (h) "Coordination of Bar Activities".

(K) *Elimination of Standing Committee on Ways and Means*

Amend Article X of the By-Laws by deleting from Section 6 line 30, "Ways and Means", and by deleting from Section 7 present subsection (cc) "Ways and Means".

(L) *Relettering subsections of By-Laws, Article X, Section 7*

After action upon the above proposed amendments and any other proposals to amend the By-Laws, Article X, Sections 6 and 7, re-letter the subparagraphs of Section 7 so that the committees appear in proper alphabetical sequence; and renumber the lines of Section 6 in corresponding order.

(M) *Procedure re reports in House of Delegates*

(a) Amend the By-Laws, Article XI, Section 1, by deleting the words in line 7 thereof, "recommending Association action", so that the sentence beginning in line 7 will read:

"No report which has not been so transmitted through the Board of Governors shall be submitted to the House of Delegates unless waiver is obtained in accordance with Section 3 of this article."

(b) Amend the By-Laws, Article XI, Section 2, by deleting the words in line 1 thereof, "recommending Association action". This line will then read "Each report:".

(c) Amend the By-Laws, Article XI, Section 3, by deleting the words in line 1 thereof, "recommending Association action", so that the first sentence of Section 3 will read:

"No report shall be considered by the House of Delegates unless there shall have been compliance with the provisions of Sections 1 and 2 of this Article or unless compliance is waived by a two-thirds vote of the House of Delegates present at the meeting upon recommendation of the Committee on Rules and Calendar with or without conditions."

(N) *Representation of the Association*

Amend the By-Laws, Article XII, Section 2, by eliminating from line 6 the word "printed" so that the second sentence of the section will read:

"Any material containing any report, recommendation or proposal circulated by any Section or Committee thereof or by any Committee of the Association shall have clearly indicated thereon that the same does not represent the view or action of the Association, unless the House of Delegates or the Board of Governors shall have taken approving action with respect thereto."

II.

Notice is hereby given that Cuthbert S. Baldwin, of New Orleans, Louisiana; Vincent P. McDevitt, of Philadelphia, Pennsylvania; Glenn M. Coulter, of Detroit, Michigan; Robert P. Hobson, of Louisville, Kentucky, and Orie L. Phillips, of Denver, Colorado, members of the Association and members of the Special Committee on Grievances, have filed with the Secretary of the Association the following amendments to the By-Laws of the Association:

(A) Amend Article X of the By-Laws by inserting in Section 6 thereof, before present line 22, "Public Relations", a new line, "Professional Grievances"; and by inserting in Section 7, immediately preceding present subsection (u) "Public Relations" the following new subsection:

"*Committee on Professional Grievances.* This Committee shall consist of seven members chosen at large from the members of the Association, with a Circuit Grievance Committee in each Federal Judicial Circuit consisting of one member from each State or Territory therein and in the District of Columbia consisting of three members therein. In the original appointment of each Circuit Grievance Committee the President shall stagger the terms of the members thereof so as to permit, with the expiration of the original terms, the appointment of successor members for three-year terms.

The Committee chosen at large shall:

(1) Formulate and recommend methods for the effective enforcement of ethics and conduct in the practice of law as a profession; develop and recommend improved disciplinary methods and procedures; cooperate with the Circuit Grievance Committees and with the disciplinary tribunals or committees established by bar associations, courts or other public authorities.

(2) Either on its own behalf or through its appropriate Circuit Grievance Committee

(a) upon their request advise or assist state and local bar associations in their activities in respect to the professional conduct of lawyers;

(b) make such investigations of professional conduct and abuses in connection with the practice of law as it may deem advisable or as may be directed by the House of Delegates or the Board of Governors;

(c) furnish information and make recommendations on the foregoing subjects to the House of Delegates, the Board of Governors or the appropriate committees and sections of the Association;

provided, however, that this Committee may in the first instance refer any complaint for investigation, hearing and report to the appropriate Circuit Grievance Committee, or to the appropriate tribunal or committee within the state, or to the appropriate state or local bar association.

(3) Either on its own behalf, or through its appropriate Circuit Grievance Committee, be authorized to consider all information as to the professional conduct and the judicial conduct of any member of the Association (excepting matters of judicial decision or judicial discretion), and to proceed in accordance with rules adopted and approved, as provided in subparagraph (4) of this section, upon its own motion or upon complaint. After a hearing thereon, either by this Committee or by its appropriate Circuit Grievance Committee, this Committee only shall recommend to the Board of Governors the censure, public or private, or the suspension or expulsion of the member; and the censure, suspension or expulsion shall become effective on approval of these recommendations by the Board of Governors.

(4) Be authorized to adopt such rules as it may deem desirable concerning the methods and procedure to be used in making investigations, in the hearing of complaints and the taking of testimony; such rules not to become effective until approved by the Board of Governors. The rules may be altered or abrogated by the House of Delegates.

(5) The Circuit Grievance Committees shall be subject to the authority and under the jurisdiction of this Committee. They shall have jurisdiction of such complaints and matters as may be referred to them by this Committee. Any reports and recommendations made by such Circuit Grievance Committees shall be cleared through and subject to the approval of this Committee.

(B) Amend Article X of the By-Laws by striking out in Section 6, line 21 the words "and Grievances" so that the present line 21 will read: "Professional Ethics"; and amend Section 7, present subsection (t) as follows:

In line 1 strike out the words "and Grievances". In paragraph numbered (1), lines 3 and 4, strike out the words "and methods for the effective enforcement of high standards"; in lines 5-8 strike out the words "develop and recommend improved disciplinary methods and procedures; cooperate with the disciplinary tribunals or committees established by courts or other public authority;" in lines 9 and 10 strike out the words "and the observance thereof". In paragraph numbered (2), lines 14-18, strike out the words "the professional conduct of lawyers and the ethics of the profession; make such investigations of professional conduct and of abuses in connection with the practice of law as may be directed by the House of Delegates or the Board of Governors"; and substitute in lieu thereof the words "the interpretation of the Canons of Ethics; and"; in line 19 strike out the words "on the foregoing subjects" and substitute in lieu thereof the word "thereon"; in line 20 change the semicolon to a period and strike the remainder of the paragraph. In paragraph numbered (3), line 31, strike out the words "considered by" and insert in lieu thereof the words "submitted to the members of". Strike all of paragraph numbered (4), lines 33-42. In paragraph numbered (5), lines 45 and 46, strike out the words and the preceding comma: ", in making investigations, in the hearing of complaints and taking of testimony".

Section 7, present subsection (t) will then read as follows:

Professional Ethics. This Committee, which shall consist of eight members, shall:

(1) Formulate and recommend standards of ethics and conduct in the practice of law as a profession; consider the Canons of Ethics of the legal profession and of judicial officers; and make recommendations for amendments to or clarifications of the Canons of Ethics when they may appear to be advisable.

(2) Upon request, advise or assist state and local bar associations in their activities in respect to *the interpretation of the Canons of Ethics; and* furnish information and make recommendations *thereon* to the House of Delegates or the Board of Governors.

(3) Be authorized, when consulted by any member of the bar or by any officer or committee of a state or local bar association, to express its opinion concerning proper professional or judicial conduct, but these opinions shall not deal with questions of judicial decision or judicial discretion, and shall not be given until *submitted to the members of* the Committee and approved by a majority thereof.

(4) Be authorized to adopt such rules as it may deem desirable concerning the methods and procedure to be used in expressing opinions; such rules not to become effective until approved by the Board of Governors. The rules may be altered or abrogated by the House of Delegates.

III.

Notice is hereby given that Mrs. Fanney N. Litvin, a member of the Association and currently chairman of the Standing Committee on Civil Service, has filed with the Secretary of the Association the following amendment to the By-Laws of the Association:

Amend the By-Laws, Article X, Section 7, by striking present sub-paragraph (e) "Civil Service," and inserting in lieu thereof the following:

(e) *Civil Service.* This Committee shall study the laws, decisions and practices of the civil service as they affect lawyers in the service of the State and Federal Governments, and shall make recommendations for the improvement of its administration.

IV.
PROPOSED AMENDMENT
to the
RULES OF PROCEDURE OF THE HOUSE OF DELEGATES

Notice is hereby given that Sylvester C. Smith, Jr., of Newark, New Jersey; Stuart B. Campbell, of Wytheville, Virginia; Osmer C. Fitts, of Brattleboro, Vermont; Lewis C. Ryan, of Syracuse, New York, and John C. Satterfield, of Jackson, Mississippi, members of the Association and members of the Committee on Rules and Calendar; and Joe C. Barrett, of Jonesboro, Arkansas; Martin J. Dinkelspiel, of San Francisco, California; Allan H. W. Higgins, of Boston, Massachusetts; Edward G. Knowles, of Denver, Colorado, and Frederic M. Miller, of Des Moines, Iowa, members of the Association and members of the Committee on Scope and Correlation of Work, have filed with the Secretary of the Association the following amendment to the Rules of Procedure of the House of Delegates:

Amend Rule X-1, paragraph (b) by making an insertion after the first sentence of paragraph (b) in line 34, so that paragraph (b) will read as follows:

(b) *The Committee on Credentials and Admissions*, which shall consist of seven members, shall have jurisdiction to consider and report on all questions which arise as to the roster of members of the House, the qualifications, selection and credentials of Delegates, and the compliance of an applying organization with the requirements entitling it to be represented in the House. *It shall have power to adopt rules requiring any local bar association or affiliated organization to submit periodically information as to representation, selection or other matters affecting the continuing qualification of such association or organization. The Committee in its report on any organization seeking affiliation with the American Bar Association shall inform the House of the length of such organization's existence, the extent of its activities, whether or not the objectives and activities of the applying organization are or could properly be embraced within the work of the Association or any of its sections and other pertinent information with its recommendation.* At the opening of each meeting, this Committee shall present to the House its recommendations as to the roster of members entitled to participate in such meeting of the House.

JOSEPH D. CALHOUN
Secretary

Economic Aid and Foreign Trade

(Continued from page 622)

and in the catacombs of Rome or fight the Crusades in defense of their personal belongings. They had a sense of mission, a deep feeling of dedication, a lofty inspiration. We know, deep down in our hearts, that we do not live by bread alone. We know that the cult of mediocrity and the fear of excellence have no place among America's finest traditions. We know also that we Americans are still capable of enduring "blood, sweat, and tears" to protect not our standard of living but the culture, the dignity, the sweetness of life, the spiritual values which we associate with our beloved America. We know that in order to exercise the leadership of western civilization in this hour of decision we must rally behind our President and prove to a confused and distracted world that we value our duties even more than our rights, our obligations even more than our privileges, and that we recognize that freedom and responsibility are inseparable.

We can hardly take refuge in the thought that it is virtuous for us to devote our energies to the satisfaction of our own appetites, and when this is accomplished, to invent new appetites to satisfy.

Neither can the challenge be met by the optimistic philosophy which holds that all life's problems can be solved either by scientific research, or by the expenditure of money, or by appointing a commission.

Vice President Nixon spelled out our obligations clearly and vigorously in a speech last October in California. "If the free world is to survive", he said, "we cannot rest on our past achievements or our present position of military superiority. We must constantly push forward on all fronts, military, economic, and moral—if we are to defeat the very real threat which the Communist empire poses to free men everywhere."

No individual—no nation—has ever achieved greatness by placing the accent on "ease". Justice Holmes said: "The measure of power is obstacles overcome", and again, "To love glory more than the temptations of wallowing ease". Had Patrick Henry said, "Give me security or give me death", his name would not be known today. The greatness of America lies not in our standard of living, wondrous as it is; not in our material possessions, unprecedented and comforting as they are; but in our ability to strive and to push ever outward the frontiers of human knowledge. It lies in our capacity to cross thought barriers as well as sound barriers. It lies in the realm of ideas, for ideas are the necessary precursors of action; even the atom bomb will move to the measure of men's thoughts. It lies not in our size as a country but in our nobility as a people—in our capacity for dedication to great causes; in our ability to live by and die for the timeless tenets of human conduct on which our country was founded. No struggle, no victory; no victory, no crown; "no wilderness, no Moses; no cross, no Christ".

> There is a tide in the affairs of men which taken at the flood leads on to fortune.

This is the tide. It is at the flood. The rest is up to us.

Books for Lawyers

NAKED TO MINE ENEMIES. *The Life of Cardinal Wolsey. By Charles W. Ferguson. Boston: Little, Brown and Company. 1958. $6.00. Pages 543.*

This biography of Cardinal Wolsey (1471-1530) should prove popular among the Bar. The Cardinal's life under King Henry VIII of England shows a crude similarity to the career of a successful, modern attorney. Let me tell the story in modern terms. A bright, middle class boy does well in school and wins a scholarship to a great university (Oxford). After a brilliant undergraduate and graduate academic record, he is employed as a junior executive in a large corporation (the Roman Catholic Church) and is rapidly promoted (with the title of Archbishop of York). He is loaned to the government to put together a crash program for an invasion of foreign soil. After a few initial blunders while learning the ropes, he has high success as a top level planner and becomes indispensible to the chief executive (the King). While in government service, he energetically grasps the strings of power and responsibilities in diplomacy, politics, public finance and building, court reorganization, education and religion. He also accumulates a large fortune. In the prime of his career, a conglomeration of problems including litigation, set-backs in programs over which he is responsible, and personal enemies in the government and in his old organization involve this great man in such a snarl that he is forced to retire from public life and is impoverished. Shortly before trial for breach of duty, he dies.

This is the simple story and tragedy, if it is such, of Cardinal Wolsey. He climbed the hard-work trail to the heights of power and success but was crushed and thrown down by the combined force of smaller men, including the King of England, Henry VIII. The simple story, of course, is not necessarily the true story.

A complicating subplot is this. Henry VIII had married Katherine of Aragon, the widow of his brother. When he became aware that she would not bear him an heir, he sought annulment from her in order to marry Anne Boleyn who happened to be a persistent enemy of the Cardinal because of a little back-stairs job he had arranged to her loss. Wolsey was given the annulment case. Although powerful and clever in all other affairs, he bungled this matter. He failed to "fix" a Pope who was trembling in his weakness and insatiable in his need. He failed to gloss over technical legalities which should have been easily distorted or fictionalized. He selected the hardest way to win the case, and then lost. And this lost annulment suit dropped him into the hands of his enemies and stayed the strong arm of the King from his defense. The proud, haughty Cardinal was swept into oblivion by the scheming mediocrities of his time. The reader wonders why did he not carry out the desires of the King. Was it religious scruples? Ignorance? Pride? A miscalculation? This becomes a guessing game which lawyers can appreciate and understand.

> Had I but served my God with half the zeal
> I served my king, He would not in mine age
> Have left me naked to mine enemies.
> —Shakespeare, *King Henry VIII*, Act III, Scene 2.

The above sentiment, spoken by Wolsey immediately before his death, intrigues the reader. If Wolsey was yielding to religious scruples in not pressing the King's annulment suit, he was in effect serving God. And yet this act was the one that tossed him helplessly to his enemies. After a life of faithfully serving the King and himself, his first act of faith unhorses him. As the author suggests, "Without the deterrent of this touching faith a man of Wolsey's resourcefulness could have found a dozen solutions to the King's problem." A lawyer reading the book will recognize at least a few of them. The author states that "Wolsey's belief that Rome was something more than a state lured him to his ruin as a politician, but at the same time his belief made him, for once, more than a politician".

And so this book and this great man's life raise again the ultimate issues of professional men, the balance of law and ethics, dogma and reason, words and ideals. This man stood up and was counted, and as often happens in real life, if not in the films, he was counted out. A life which includes one such moment is worth reading about.

The book is well researched and, in passing, provides insight into the social and economic conditions of the time. This age was a yeasty period when hard working and crafty men were rising more rapidly through the classes than ever before. Either by their efficiency, like Wolsey, their military effectiveness, like the then Duke of Suffolk, Charles Brandon, son of a common soldier, or their personal charms, like Ann Boleyn, many alert human beings were leaping the barricade erected by the rules of class breeding. Money and power were there for the grasping. As you read this history, you smell the first hot breath of the surge of individual opportunity which will never end. Even as the nobility of England and France postured on the Field of Cloth of Gold in the Val Dore (a solemn event staged and produced by Wolsey), the age of nobility was over. Nobility was based on unsound economics and was doomed. Taxes, military expenditures, federal government and politics were beginning to carry the freight. Just when the people of Europe blew the whistle on the brave tin men on horseback, Cardinal Wolsey lived his span in an age full of interest and adventure, and he lived it to the hilt.

ROBERT COULSON

New York, New York

THE ADVOCATE'S DEVIL. *By C. P. Harvey, Q.C. London: Stevens & Sons, Limited. 1958. $3.55. Pages xi, 166.*

This charming little book embodies informal but keen and discerning comments by an English barrister concerning judges, lawyers, the common law and the administration of justice generally. It is both informative and delightful reading not only because of the nature of its interesting and challenging contents, but also because it is couched in a facile and felicitous style which is seasoned with flashes of penetrating wit and garnished with occasional irony and whimsey. Although seemingly written in part at least in a lighter vein, nevertheless, underneath the surface it contains many sage observations and much material for reflection. It is impracticable within the scope of a brief review to give an adequate impression of the entire range covered by the book.

Among the topics discussed that are of particular interest to American readers is the distinction in the legal profession in England between solicitors and barristers and the functions of the barristers. The author points out that the barrister never interviews witnesses. This is done by the solicitor who prepares a detailed trial brief for the barrister who uses the brief in his examination of witnesses at the trial. He shows that the barrister may never assert at the trial his belief in the merits of the case that he is arguing, or the innocence of the defendant whom he represents. He uses the phrase, "I submit that . . .", and never says, "I think that . . .", or "I believe that . . ." There is no doubt that the division of functions between barristers and solicitors makes it possible for the barrister to take a more objective and detached view of his client's case than is possible under the American system. The very objectivity in the long run redounds to the benefit of the clients. So, too, trials are more skillfully conducted than is often true in this country, where many a lawyer goes to court only on rare occasions and yet undertakes to try a case now and then.

The author also points out that under the English system the barrister is under an obligation to accept all cases tendered to him, provided, of course, his fee is paid. Thus, no obloquy attaches to counsel who represents an unpopular cause or a disreputable party. On the other hand, this course is possible only because the barrister is required to and actually does maintain an objective and detached attitude. The author calls attention to the fact that Canon 31 of the Canons of Ethics of the American Bar Association is entirely contrary to the English concept because it provides that a lawyer has the right to decline employment.

Readers interested in advances made in modern judicial procedure will be attracted by the discussion of present English procedure and especially the author's comments on broad and liberal discovery. He apparently has considerable familiarity with American usage for he comments at some length on the fact that American lawyers are amazed when they visit the London courts at not hearing any objections to questions. This reviewer has been impressed by the same fact, as well as by the expedition and efficiency with which trials move in England. So, too, American lawyers will be surprised to learn that engagement of counsel in another case is not a ground for postponing a trial.

The author comments unfavorably on the elective judiciary, such as is found in a majority of the states. The English reader would get a more complete picture, however, if the author added that members of the federal judiciary are appointed for life, approximately in the same manner as English judges, and that the tendency is for more and more important litigation to go into the federal courts.

Space does not permit a reference to some of the other vital topics discussed by the author. Suffice it to say that this work is a valuable and constructive contribution to legal literature and that this reviewer recommends its perusal by all members of the Bench and Bar who are interested in the advancement of their profession.

ALEXANDER HOLTZOFF

United States District Court
Washington, D. C.

AGAINST THE TYRANT. *By Oscar Jaszi and John D. Lewis. Glencoe, Illinois: The Free Press and The Falcon's Wing Press. 1957. $5.00. Pages 255.*

Tyrannicide, the killing of tyrants, is shown to have been an important factor in the development of civilization and world history by the authors, one of whom was born in Hungary and the other in this country. The tradition and theory of tyrannicide is thoroughly and carefully covered from the time of Plato and Aristotle to the present dictatorships. The realistic political theory that has had to be faced in order to combat tyrants down through the centuries, the moral question of the rights of individuals under tyrannical government, the methods found necessary and used to overcome oppressive tyranny so that individual liberty and freedom may survive, and the thoughts, together with the philosophies of the leaders in political theory, government and religion, which justified tyrannicide in the instances where used are all a part of the principal theme of the book. It begins with the classical and Christian thought, carries through the medieval theories, the resistance in Protestant thought, the English struggle for individual freedom, the systems set up by Nazism, Fascism and Communism; even projects what may be expected in the future.

Of particular interest was the problem, amply developed and portrayed by the authors, that both the political thinking on tyrannicide and the difficulty of carrying it out have progressed through the centuries. That while at one time one man, or a small group, could substantially accomplish the purpose desired by tyrannicide by eliminating tyrannical government when a leader was killed, such as in the case of the assassination of Julius Caesar by Brutus, a much more elaborate organization and plan is necessary where systems have been built up by rulers, such as in Nazi Germany and Communist Russia. Now, there appears to be required, for effective tyrannicide, not only an elaborate method of gaining access to the tyrant

himself, but a substitute organization must be ready to resist and overthrow the entire organization of the tyrant, including the whole tyrannical government so that a substitute for the leader may not defeat the objectives of tyrannicide.

Of interest to lawyers is the effect that the use of tyrannicide, its tradition and theories, has had on the development of laws and government and struggle for individual freedom and liberty in the progress of our civilization; government under rule of law rather than rule by men. The authors seem to have lost no opportunity in developing these aspects of every incident of tyrannicide, and its effect on the governments and civilization of that time.

While tyrannicide is no longer considered as a method of correcting abuse in this country, some of the philosophies used to support tyrannicide bring to mind some of the similar philosophies developed in struggles now going on in this country. The object of tyrannicide being to aid man in his struggle for freedom, the justification of the philosophy of tyrannicide may be seen, as stated by the authors:

> Both morality and reason dictate the right to resistance against unlawful pressure and the vicious misuse of sovereignty, seeking to restore a sufficient degree of individual liberty and the moral freedom without which life is worthless and the roads toward the higher values of the human community are blocked. Tyrannicide may be the last resort in a desperate situation in which other means of resistance offer no chances for the liberation of the community.

The authors point out that the crucial point of the problem will remain:

> the maintenance of a sufficient number of free men, fortified in their conviction that human dignity and the moral self-determination of the individual are superior to the aims of the state.

The authors sum up with the confident belief that freedom, the object of tyrannicide, will ultimately prevail against tyranny, for, among other reasons:

> the system of slavery is self-defeating and corrupts the rulers themselves: "When wicked men come together there is a conspiracy, not a companionship; they do not love each other, but fear each other; they are not friends, but accomplices." I think these are the only arguments for the victory of freedom. There are no others. But it seems to me that they are stronger than the arguments for the victory of servitude.

The book presents an unusual approach to man's ageless struggle for freedom. As presented by the authors, it is very instructive and engaging. It is well worth the reading for one desiring to broaden the scope of his thinking in that greatest of all pursuits of man—FREEDOM UNDER LAW.

EDWIN LUECKE

Wichita Falls, Texas

FOREIGN COMMERCE AND THE ANTITRUST LAWS. *By Wilbur L. Fugate. Boston: Little, Brown and Company. 1958. $16.00. Pages 384.*

The increase in American export trade to foreign countries since World War II is substantial and significant. The effect of trade regulations in foreign countries upon American business activity has compelled many American businesses to establish a variety of both manufacturing and sales facilities abroad.

In former years, foreign business activity by American business concerns was generally limited to the very large American companies. Now all types and sizes of American businesses are actively engaged in business activities abroad. This, in turn, has made it necessary for many lawyers to dig into a rather complex field of law applicable to their clients' activities abroad.

Wilbur Fugate's book is the most complete analysis of the antitrust and allied laws applicable to the nation's foreign commerce which has been done to date. Over the years there have been a number of law review articles and other publications dealing with particular aspects of the law involving American foreign business activities, but this is the first publication that has presented in one volume an analysis in depth of all of the applicable federal laws.

Mr. Fugate brings into the discussions of these thorny problems not only the present state of the law, but also the probable future course of the law. As a principal attorney in the Antitrust Division of the Department of Justice for the past ten years, he has had a full experience in the field, and, although this book in no way purports to represent the official attitude of the Antitrust Division, it nevertheless reflects the Government's attitude about many important problems not yet resolved by the courts. The treatise is thus exceedingly useful in the analysis of plans for unconventional ventures of business clients in foreign countries.

Wisely, Mr. Fugate has begun his book with a short and concentrated treatise on the antitrust laws generally. No understanding or evaluation of the antitrust implications of foreign commerce and foreign business activities can be had without understanding the basic antitrust philosophy distilled from the decided cases covering both domestic interstate and the smaller number of foreign commerce cases.

The comprehensiveness of this fine work is briefly illustrated by the chapter titles:

1. Antitrust Statutes—Basic Philosophy and General Interpretation.
2. Jurisdiction over Foreign Commerce Under the Antitrust Laws.
3. Antitrust Jurisdiction in Personam over Corporations Operating Abroad.
4. Application of Antitrust Laws to International Trade Practices Generally.
5. Rule of Reason, Ancillary Restraints and Antitrust Defenses.
6. Monopoly in Foreign Trade.
7. The Webb-Pomerene Act.
8. Patents and Technology.
9. Trade-Marks in Foreign Trade.
10. Foreign Subsidiaries and Acquisitions.
11. Joint Exploitation Abroad.
12. Foreign Investment.
13. Auxiliary Antitrust Statutes and Antitrust Provisions of Regulatory Statutes.
14. Nature of Antitrust Relief in Foreign Trade.
15. Antitrust Trends and Policies in Foreign Trade.

Mr. Fugate's book is not a mere narration of decided cases, but contains straightforward, and oftentimes astringent, comment about all types of

foreign commerce situations. The result is that the work will be exceedingly helpful to the lawyer who faces such problems because it points out areas of caution that must be observed, as well as areas of stable and decided antitrust attitude.

This treatise is one of a series being published under the heading of *The Trade Regulation Series*, edited by Professor S. Chesterfield Oppenheim of the University of Michigan. There is no statement as to whether supplements to this volume will be forthcoming, but it is hoped that it will be supplemented from time to time as the need arises. This book is recommended for every attorney who represents business clients now engaged in foreign business endeavors or who contemplate engaging in such business. It will save attorneys countless hours of research and the painstaking accumulation of material otherwise required to resolve the many specialized antitrust problems which are involved. In fact, it might be an appropriate gift to corporate executives who, although they may not understand many of the fine legal distinctions made by the author, may nevertheless become better informed generally about the nature of the legal problems involved in their present and prospective foreign business activities.

H. Graham Morison

Washington, D. C.

HANDBOOK OF EVIDENCE FOR THE IDAHO LAWYER. *By George M. Bell. Caldwell, Idaho: The Caxton Printers, Ltd. 1957. $10.00. Pages 294.*

The *Handbook of Evidence for the Idaho Lawyer* is a unique and fascinating book. It presents a strong plea to lawyers to follow cases dealing with various items of evidence in the trial of lawsuits. The book is published for the purpose of aiding the legal profession of Idaho in the administration of justice. The author of the book is directing his attention largely to his former students with the hope that they will be able to present their cases in court based upon proper evidence approved by the Supreme Court of the state.

The book contains a collection of the rulings of the Idaho Supreme Court on the law of evidence from the year 1866 to 1956. During these ninety years over 2,000 rulings have been examined and evaluated, and lawyers using this book can very conveniently secure the rulings of the Idaho court. Some cases are quite severely criticized and some rulings have been changed in recognition of a change of conditions. The writer is very fair in the examination of these cases and the book will be extremely helpful to the Idaho lawyer and to the district judges. Practically every point which may arise in the presentation of a case is considered.

Considerable attention is given to the impeachment of witnesses and the rights of witnesses are well guarded. The author recognizes the rule that impeachment of a witness should only be attempted when the lawyer is convinced that the witness has improperly testified. The witness should not be torn to pieces where such a procedure is of no value to the case or has no merit.

The author is very frank in calling attention to certain cases which are not in harmony with earlier cases on specific points and opinions which do not square with reason. He then calls attention to some decisions very ably written and compliments the court for the mental ability which appears from the case.

Idaho statutes are very frequently cited and analyzed and cases construing the same are cited and in some instances criticized and other instances praised. The question of privilege is given considerable attention as is also the right to invoke the privilege when the matter arises in connection with the doctor and patient, husband and wife, attorney and client and some other relationships. The hearsay rule and parole evidence rule are given considerable attention. These precede the discussion of the best evidence rule and the theory and weight of presumptions.

Over the ninety years covered by the supreme court cases, the history of the state is interestingly portrayed. The growth and development of this state appears in a most fascinating way in these decisions.

On first reading of the book, one would feel that it is written by a teacher as a tool and guide for his pupils with the hope that it would help them later in the conduct of their cases in court. The theory is unique and commendable. However, it is to be observed from a reading of the book that not only Idaho lawyers and students of the Idaho Law School may be helped considerably by it but any lawyer in any state may understand and feel the value of fundamental knowledge of the rules of evidence covering a large scope of law presented in almost every case. Some of the trial judges in Idaho are now using the book as a definite guide in the ruling on evidence where objections are made.

The author has a keen sense of evaluation. He can readily see that every case is controlled by its own facts and while in general the rules of evidence necessarily apply, yet in each particular case the facts must be given consideration, and a great deal will depend upon the good judgment of the trial judge.

One of the vital characteristics of the trial of a lawsuit is the application of the correct rules of evidence admitting that testimony which is pertinent and avoiding the confusion of a jury with irrelevant and impertinent conclusions thus reducing the time consumed and clarifying the facts in such a manner that a jury can readily understand them.

The book is highly recommended to all Idaho lawyers and to those lawyers of other states who are particularly interested in the trial of cases.

A. L. Merrill

Pocatello, Idaho

THE RIGHT OF THE PEOPLE. *By William O. Douglas. Garden City, New York: Doubleday & Company, Inc. 1958. $4.00. Pages 237.*

A lecture series affords an author an opportunity for a crystal clear distillation of his thoughts. This Mr. Justice Douglas has done in the North Foundation lectures he delivered at Franklin and Marshall College in the spring of 1957. They are here substantially re-

(Continued on page 685)

Review of Recent Supreme Court Decisions

George Rossman
EDITOR-in-CHARGE

Agriculture
stockyards

Denver Union Stock Yard Company v. *Producers Livestock Marketing Association, Benson* v. *Producers Livestock Marketing Association*, 356 U. S. 282, 2 L. ed. 2d 771, 77 S. Ct. 738, 26 U. S. Law Week 4256. (Nos. 106 and 118, decided April 28, 1958.) *On writs of certiorari to the United States Court of Appeals for the Tenth Circuit. Affirmed.*

At issue here was the validity of certain regulations of the Denver Union Stockyard under the Packers and Stockyards Act, 7 U.S.C. §§181 *et seq.* The regulations in question provided that no market agency or dealer engaging in business at the Stockyard should solicit business for other markets or outside yards, or divert or attempt to divert livestock from the Denver Stockyard or engage in any practice that would interfere with the normal flow of livestock to the public market at the Denver yard.

The respondent, a marketing agency at the Denver Stockyard, complained about the regulation to the Secretary of Agriculture, contending it was invalid on its face as a matter of law. The Judicial Officer to whom the question was referred dismissed the complaint, holding that the Regulations were not invalid on their face. The Court of Appeals reversed and remanded to the Secretary with directions to issue a cease and desist order against enforcement of the Regulations.

The Supreme Court affirmed, speaking through Mr. Justice DOUGLAS. The Court declared that the regulation was an obvious violation of the Act. Section 304 of the statute makes it the duty of every marketing agency "to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard", the Court pointed out, and it would plainly be the duty of the respondent to furnish stockyard services at Kansas City if a producer so desired. The regulations would bar the agency from performing that statutory duty, the Court said. "The case is as simple to us as that of a utility that refuses to sell any power to a customer if the customer buys any power from competitor; as clear as an attempt by a carrier by rail to deny service to one who ships by truck."

In a concurring opinion, Mr. Justice CLARK said that ordinarily there might be evidence to show that regulations invalid on their face are not in fact unjust, unreasonable or discriminatory as applied, and so a remand to the Secretary would be in order. He was not in favor of that here, he said, because it was crystal clear, from an affidavit of the President of the Stockyard, that the intended effect of the invalid regulations was to monopolize the livestock market in the State of Colorado.

Mr. Justice FRANKFURTER, joined by Mr. Justice HARLAN, wrote a dissenting opinion which argued that the case should have been remanded to the Secretary to determine the effect of the regulations in practice.

Mr. Justice WHITTAKER also wrote a dissenting opinion in which Mr. Justice FRANKFURTER and Mr. Justice HARLAN joined. This opinion refused to agree that the regulations were invalid on their face, and it emphasized the words "at such stockyard" in the statute, holding that these words could be interpreted as meaning that the marketing agent acquired the rights and assumed the duties of such only at each stockyard at which it was registered. Registration at another stockyard, under this view, would create another marketing agent, and even though the same person owned both, the regulations, by that fact alone, would not be violated.

The cases were argued by Ashley Sellers and Neil Brooks for the petitioners and by Hadlond P. Thomas for the respondent.

Aliens . . .
deportation

Dessalernos v. *Savoretti*, 356 U. S. 269, 2 L. ed. 2d 751, 77 S. Ct. 690, 26 U. S. Law Week 4251. (No. 287, decided April 14, 1958.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Judgment vacated and cause remanded.*

In this brief *per curiam* opinion, none of the facts are given. The Court notes that the parties stipulated that the sole question was whether the petitioner was entitled to have his application for suspension of deportation considered under Section 244(a) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. §1254(a)(1). The Court announced its decision that he was so entitled.

Mr. Justice HARLAN, joined by Mr. Justice CLARK, dissented, saying that there was an "undisturbed administrative finding" that the deportation would not result in "exceptional and unusual hardship" and the parties' stipulation was ineffective to confer jurisdiction on the Court to decide the question sought to be answered.

Mr. Justice FRANKFURTER noted that he would have joined Mr. Justice HARLAN's dissent "if he read the record to be as clear as the latter finds it to be".

The case was argued by David W. Walters for the petitioner and by Maurice A. Roberts for the respondent.

Constitutional law . . .
contempt

Green v. *United States*, 356 U. S. 165, 2 L. ed. 2d 672, 77 S. Ct. 632, 26 U. S. Law Week 4183. (No. 100, decided March 31, 1958.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Affirmed.*

Reviews in this issue by Rowland Young.

At issue here were the contempt convictions of two leaders of the Communist Party who forfeited bail and remained in hiding for nearly five years after being convicted of violation of the Smith Act. They surrendered themselves to a United States Marshal in 1956, and were tried under 18 U.S.C. § 401(b) for criminal contempt in the District Court without a jury for failing to obey the original surrender order. The District Court found them guilty and imposed three-year sentences to commence after service of the five-year sentences imposed in the conspiracy case. The Court of Appeals affirmed.

Mr. Justice HARLAN delivered the opinion of the Court which upheld the convictions. The petitioners had raised several grounds for reversal, which the Court discussed in order.

First, it was argued that the criminal contempt power of the federal courts does not extend to orders requiring the surrender of bailed defendants. This argument was based on the history of the contempt power in England prior to the Revolution, it being contended English courts dealt with absconding defendants under the ancient doctrine of outlawry, and that the Judiciary Act of 1789 and all subsequent statutes incorporated the English practice, including Section 401(3) of the existing contempt statute. To this the Court answered that, however English courts treated absconding defendants in practice, they had the power to treat wilful disobedience of their orders as contempt. The Court's review of the statutory history convinced it that the contempt power was intended to cover this situation.

The petitioners also contended that the evidence failed to establish that they knew of the existence of the surrender order. The Court refused to accept this argument, declaring that from the undisputed facts it was permissible for the District Court to infer that they knew of the surrender order, particularly in view of statements they released to the press before they finally did surrender themselves in 1956.

A third argument advanced for reversal was that, under the Clayton Act, the power to punish for contempt under Section 401 is limited to one year. The petitioners said that the purpose of the Clayton Act was to "freeze into federal contempt law" the custom of the federal courts, which, at the time the act was passed, had never imposed a contempt sentence of more than a year. The Court rejected this argument on the ground that there was nothing to show that Congress was aware of the sentencing practices of the courts or that the act referred to contempt procedures. The Court also dismissed a rather ingenious constitutional argument which reasoned thus: Infamous crimes are those punishable by imprisonment in a penitentiary, and imprisonment in a penitentiary can be imposed only if the crime is subject to imprisonment for more than a year. Hence, the argument ran, criminal contempt was an infamous crime, which under the Fifth Amendment requires indictment by a grand jury. The Court replied that the precedents did not support this theory and that the constitutional guarantees of indictment and trial by jury did not apply to contempt cases.

The Court also refused to hold that the three-year sentences were an abuse of discretion on the part of the trial court. The contempt was egregious, the Court noted, the sentences imposed on these petitioners were no longer than those imposed (and later upheld) on two other Communist leaders who fled to escape going to prison and furthermore the sentences were within the maximum five-year term for bail-jumping now provided by statute.

In a concurring opinion, Mr. Justice FRANKFURTER discussed the fact that modern scholarship suggests that the historical assumptions are wrong regarding the procedure of punishment for contempt. The opinion said that regardless of this, no one has doubted the constitutionality of the power of courts to punish contempt summarily. If any change is to be made, the opinion declared, Congress should do it, not the Court.

Mr. Justice BLACK, joined by the CHIEF JUSTICE and Mr. Justice DOUGLAS, wrote a dissenting opinion which urged a complete reconsideration of the problem of punishment for contempt of court. In this view, criminal contempt cases, as distinguished from civil contempt, should be treated like any other offense and tried by a jury. The dissent called the power of judges to punish summarily "arbitrary and dangerous".

Mr. Justice BRENNAN also wrote a dissenting opinion in which the CHIEF JUSTICE and Mr. Justice DOUGLAS joined. This opinion argued that the proof that the petitioners knew of the surrender order before they fled was insufficient to support the convictions.

The case was argued by John J. Abt for the petitioners and by Ralph S. Spritzer for the United States.

Constitutional law . . . *self-incrimination*

Brown v. *United States*, 356 U. S. 148, 2 L. ed. 2d 589, 77 S. Ct. 622, 26 U. S. Law Week 4201. (No. 43, decided March 31, 1958.) *On writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Affirmed.*

The Court here upheld a contempt conviction of a witness who had voluntarily offered testimony after she had asserted her privilege against self-incrimination on cross examination at an earlier stage of the proceedings. The trial court ruled that she had waived her privilege and held her in contempt when she refused to answer certain questions on direct examination at a latter stage of the proceedings.

At a hearing for denaturalization brought against her, the petitioner was called by the Government as an adverse witness, but she refused to answer questions about Communist Party membership and activities, asserting the self-incrimination provisions of the Fifth Amendment. Later she took the stand in her own behalf and, on cross examination, again asserted the privilege. The trial court ruled that, by taking the stand, she had waived the privilege and when she persisted in her refusal to answer, adjudged her in contempt and sentenced her to six months' imprisonment. The Court of Appeals affirmed.

The Supreme Court spoke through Mr. Justice FRANKFURTER. The Court likened the petitioner's situation to that of a defendant in a criminal action.

"If he takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination" the Court declared. A voluntary witness, the Court explained, "has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute."

Calling the decision another by the Court "eroding the constitutional privilege against self-incrimination", Mr. Justice BLACK dissented, arguing that the rule of waiver relied upon by the Court should be confined to criminal cases. A criminal defendant's failure to take the stand may not be adversely commented upon by the prosecutor or judge, the dissent argued, and so to apply the criminal law waiver rule here places the defendant in a dilemma: if he testifies voluntarily, he can be made to give incriminating evidence against himself, but if he does not testify, his silence can be used against him, since the failure of a party to testify in a civil action may be freely commented upon by the adversary. The CHIEF JUSTICE and Mr. Justice DOUGLAS joined in the dissent.

Mr. Justice BRENNAN also wrote a dissenting opinion which took the position that the trial judge's ruling on the waiver question had been technically incorrect and that his "exclusive reliance upon the criminal contempt power was arbitrary in the circumstances".

The case was argued by George W. Crockett, Jr., for the petitioner and by Ralph S. Spritzer for the United States.

Courts . . . *judgments*

United States v. *F. & M. Schaefer Brewing Company*, 356 U. S. 227, 2 L. ed. 2d 721, 77 S. Ct. 674, 26 U. S. Law Week 4239. (No. 79, decided April 7, 1958.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Reversed.*

The question in this case was what constitutes "entry of judgment" within the meaning of the Federal Rules of Civil Procedure.

The case was an action for taxes allegedly illegally collected. The District Court granted a motion for summary judgment on April 14, 1955. On that date the clerk entered on the docket a notation: "Decision rendered on motion for summary judgment. Motion granted. See opinion on file." On May 24, the taxpayer presented to the judge, and he signed and filed, a formal document captioned "Judgment" which referred to the motion and to the "opinion" of April 14, and then continued "ORDERED, ADJUDGED AND DECREED that the plaintiff . . . recover . . . the sum of $7,189.57 and interest thereon . . . and that plaintiff have judgment against defendant therefor." The clerk stamped this document "Judgment rendered" and made another notation in the docket. On July 21, the Government filed a notice of appeal which was dismissed by the Court of Appeals on the ground that it was not taken within sixty days after the "entry of the judgment", as required by the Federal Rules, the Court holding that the opinion of April 14 was a "decisive and complete act of adjudication".

The Supreme Court reversed, speaking through Mr. Justice WHITTAKER. The Court said that whether an opinion embodies a final decision is a question of the intention of the judge and no form of words and no peculiar act is necessary to show entry of a judgment. The Court concluded that the April 14 "opinion" and docket notation did not constitute entry of judgment here since there was no determination of the amount of money awarded, the Court pointing to Rule 79(a) which requires the clerk's entry to "show . . . the substance of [the] judgment of the court. . . ." Surely, the Court declares, the amount of a judgment for money is a vital part of its substance.

Mr. Justice FRANKFURTER wrote a dissenting opinion in which Mr. Justice HARLAN joined. The dissent argued that it was settled practice in the Second Circuit that the granting of a motion for summary judgment constituted an "entry of judgment". The dissent would have allowed the local custom to prevail, since it was not in conflict with the Federal Rules nor unreasonable.

Mr. Justice HARLAN also wrote a dissenting opinion which expressed the view that it would have been better to affirm the judgment with an "appropriate suggestion" to district judges to leave no room for argument about their intentions respecting finality.

The case was argued by Leonard B. Sand for the United States and by Thomas C. Burke for the respondent.

Government corporations . . . *Panama Canal Company*

Panama Canal Company v. *Grace Line, Inc., Grace Line, Inc.* v. *Panama Canal Company*, 356 U. S. 309, 2 L. ed. 2d 788, 77 S. Ct. 752, 26 U. S. Law Week 4264. (Nos. 251 and 252, decided April 28, 1958.) *On writs of certiorari to the United States Court of Appeals for the Second Circuit. Reversed.*

This decision held that judicial action would not lie to compel the Panama Canal Company to readjust the tolls charged for use of the Canal.

Several American shipping companies that use the Canal instituted this suit in the District Court to compel the Company to prescribe new tolls and to refund tolls allegedly illegally collected. The District Court dismissed the complaint for want of jurisdiction. The Court of Appeals refused to award a refund, but on other phases of the complaint entered summary judgment against the Company.

The Supreme Court reversed in an opinion written by Mr. Justice DOUGLAS. The Court noted that the Company was a corporation created by the Federal Government to operate and maintain the Panama Canal. By Act of September 26, 1950, Congress empowered the Company to prescribe rules for the measurement of vessels using the Canal and the toll rates, subject to the approval of the President. The Company is an agency of

the Government and is wholly owned by the United States. The present suit was apparently begun after the Comptroller General expressed the view that the Company's accounting methods were based on a misinterpretation of the statute. The Court declined to enter this question, saying that Congress had left the question of readjustment of the canal tolls to the Company. Under Section 10 of the Administrative Procedure Act, the Court pointed out, questions "by law committed to agency discretion" are excluded from judicial review. The case was quite different, the Court said, from the situation where a statute creates a duty to act and suit is brought to review ministerial duties of a nondiscretionary nature.

The cases were argued by Solicitor General Rankin for the Panama Canal Company and by C. Dickerman Williams for the shipping companies.

Railroads . . .

Employers' Liability Act

Sinkler v. *Missouri Pacific Railway Company*, 356 U. S. 326, 2 L. ed. 2d 799, 77 S. Ct. 758, 26 U. S. Law Week 4253. (No. 133, decided April 28, 1958.) *On writ of certiorari to the Court of Civil Appeals of the State of Texas, Ninth Supreme Judicial District. Reversed and remanded.*

The petitioner was a cook employed by the Missouri Pacific. While at work in a car, a switching crew employed by the Houston Belt and Terminal Railway Company undertook to switch the car from one track to another. Through the fault of the crew, the car collided violently with another and the petitioner was injured. He recovered a judgment against the Missouri Pacific under the Federal Employers' Liability Act, 45 U.S. C. §§ 51-60, in a state court. The Court of Civil Appeals reversed on the ground that the statute did not subject the employer to liability for injuries caused by the fault of the employees of an independent contractor.

The Supreme Court reversed, speaking through Mr. Justice BRENNAN. The Court found in the "broad purpose" of the statute authority for holding that Belt Railway employees on the job "were, for purposes of the FELA, as much a part of the respondent's total enterprise as was the petitioner while engaged in his regular work on the respondent's car". Respondent's trains were being switched by Belt employees, the opinion declared, in furtherance of the respondent's enterprise, and the petitioner was entitled to recover, "not because the employer is himself to blame, but because justice demands that one who gives his labor to the furtherance of the enterprise should be assured that all combining their exertions with him in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his part will not be endangered. If this standard is not met and injury results, the worker is compensated in damages."

Mr. Justice CLARK noted that he concurred in the result, "believing that for purposes of the FELA, the Belt Railway was performing a nondelegable duty of respondent's at the time of petitioner's injury".

Mr. Justice WHITTAKER noted that he concurred in the result believing that the petitioner "was also [a] *passenger* at the time and place in question and that respondent's franchised carrier responsibilities to him as its passenger were nondelegable".

Mr. Justice HARLAN, joined by Mr. Justice FRANKFURTER, dissented, calling the decision a further step in the direction of converting the Employers' Liability Act into a workmen's compensation statute. The Act was founded upon common law principles of liability, the dissent argued, and at common law, Belt would have an independent contractor.

The case was argued by Cornelius O. Ryan for the petitioner and by Roy L. Arterbury for the respondent.

Seamen . . .

Jones Act

Grimes v. *Raymond Concrete Pile Company*, 356 U. S. 252, 2 L. ed. 2d 737, 77 S. Ct. 687, 26 U. S. Law Week 4246. (No. 456, decided April 7, 1958.) *On writ of certiorari to the United States Court of Appeals for the First Circuit. Reversed and remanded.*

The petitioner here was seeking damages under the Jones Act, 46 U.S. C. § 688 for injuries he sustained while traveling in a Navy life ring from a tug to a Texas tower under construction by his employers, the respondents. The District Court directed a verdict for the respondents on the ground that the petitioner's exclusive remedy was under the Defense Bases Act, 42 U.S.C. §§ 1651-1654. The court also held that there was a fact question whether the petitioner was a crew member. The Court of Appeals held that the Defense Bases Act was not the exclusive remedy for a member of a crew, but it affirmed on the ground that there was not enough evidence to create a question as to whether the petitioner was a crew member.

The Supreme Court reversed and remanded, noting in a *per curiam* opinion that it agreed with the Court of Appeals that the Defense Bases Act saves the Jones Act remedy for a member of the crew of a vessel, but it agreed with the District Court that there was enough evidence to go to a jury on the question of the petitioner's being a member of a crew.

Mr. Justice FRANKFURTER noted that, since the case turned entirely upon evaluation of the evidence, the "writ of certiorari was improvidently granted and should be dismissed."

Mr. Justice HARLAN, joined by Mr. Justice WHITTAKER, wrote a dissenting opinion which, after setting forth the facts in some detail, argued that a jury could not permissibly find petitioner to be a member of a crew of a vessel "under any sensible meaning of that phrase".

The case was argued by Harry Kisloff for the petitioner and by Frank L. Kozol for the respondents.

Taxation . . .

annuities

Fidelity-Philadelphia Trust Company v. *Smith*, 356 U. S. 274, 2 L. ed. 2d 765, 77 S. Ct. 730, 26 U. S. Law Week 4268. (No. 130, decided April 28, 1958.) *On writ of certiorari to the United States Court of Appeals for the Third Circuit. Reversed.*

The issue here was the taxability, as part of her estate, of certain annuity payments of the decedent.

In 1934, the decedent purchased

three single-premium life insurance policies with a total face value of $350,000. At the time, the decedent was 76 and the policies were obtained without a medical examination. As a condition to selling the policies, the insurance companies required that she also purchase for each life insurance policy a separate annuity policy, the size of each annuity being calculated so that in the event the insured died prematurely, the total premiums paid for life insurance and the annuity, less the amount already paid on the annuity, would equal the amount of insurance due. Each annuity policy could have been purchased without the insurance policy for the same premium charged for it under the annuity-life insurance combination. The decedent assigned all rights and benefits under two of the life insurance policies to her children and the other to the petitioner as trustee. A gift tax was paid on these transfers in 1935, and in 1938 the decedent amended the trust so that it became irrevocable, retaining no beneficial or reversionary interest.

The insured died in 1946. The proceeds of the three insurance policies were not included in her estate in the estate tax return. The Commissioner assessed a deficiency, the executors paid the tax and filed for a refund. The District Court held for the taxpayers, but the Court of Appeals reversed.

The Supreme Court's opinion was written by the CHIEF JUSTICE. The Government took the position that the two types of policies represented one investment and that the annuities were income from property transferred to the children by means of the life insurance policies. The Court disagreed, saying that the annuity policy could have been acquired separately and the annuities arose from the personal obligations of the insurance companies and were in no way conditioned on the continued existence of the life insurance policies. The annuities would have continued even if the life insurance had been extinguished, the Court pointed out.

Mr. Justice BURTON wrote a dissenting opinion in which Mr. Justice BLACK and Mr. Justice CLARK joined. The dissent said that the case was the same as one in which a settlor places a sum in trust, with the income payable to him for life, the principal to be paid to designated beneficiaries on his death. The principal in that case would be includable in the estate at death, the dissent argued, and so the life insurance policies should be included here.

The case was argued by Robert T. McCracken for the petitioners and by Myron C. Baum for the respondent.

Taxation . . . *tax liens*

United States v. *Ball Construction Company*, 355 U. S. 587, 2 L. ed. 2d 510, 77 S. Ct. 442, 26 U. S. Law Week 4169. (No. 97, decided March 3, 1958.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Reversed.*

The Court's *per curiam* opinion in this case was only a note and simply announced, without any statement of the facts, that the "instrument involved being inchoate and unperfected, the provisions of §3672(a) Revenue Act of 1939 . . . do not apply". The Court then cited *United States* v. *Security Trust and Savings Bank*, 340 U. S. 47, and *United States* v. *City of New Britain*, 347 U. S. 81.

Mr. Justice WHITTAKER, joined by Mr. Justice DOUGLAS, Mr. Justice BURTON and Mr. Justice HARLAN, wrote a dissenting opinion which sets forth the facts. Briefly, the case was one of a surety on a performance-bond seeking to establish priority over a federal tax lien. Part of the inducement to the surety was the subcontractor's assignment to it of "all sums due or to become due under the subcontract". The District Court had held that, by terms of the assignment, the surety became a mortgagee of the fund and therefore its right was superior under Section 3672(a) to the subsequently filed federal tax claims. The Court of Appeals had affirmed. Agreeing with the courts below, the dissent argued that the cases cited by the Court were controlled by and decided upon Section 3670 and 3671 of the 1939 Code and those cases did not support a reversal here, which was a Section 3672 case. The dissent argued that the assignment was indeed a mortgage, and, since it antedated the filing of the federal tax liens, it was superior to them under Section 3672(a).

The case was argued by Alexander F. Prescott for the United States and by Josh H. Groce for the respondents.

Editorials

(Continued from page 652)

it is the *client* and not the *lawyer* who is causing whatever traffic jam in the courts results from jury demands.

Assessing the blame does not solve the admitted problem of delayed justice in negligence cases. Every lawyer has training in negotiating. One way of relieving court congestion is by settling cases without requiring a court to determine the fair amount—if any—which should be paid. Today, more than in the past, there is a duty upon counsel to exhaust settlement possibilities.

The past thirty years have seen a period of great expansion in legal regulation and of law practice. Yet the same period has been one of concurrent decline in the work of trial lawyers—except in negligence work. Here then is an area where lawyer-like statesmanship is needed. The old maxim, "A poor settlement is better than a good lawsuit," still contains wisdom. And the lawyer who dreams of those six-figure verdicts may well ponder this conclusion by one of the Midwest's leading trial lawyers:

> From the standpoint of income the defense attorney handling a volume of litigation can increase his earnings better by negotiating settlements than he can by trying cases. A lawyer's time is his money. The preparation and trial of a case requires many hours of time. The attorney will earn more by efficiently negotiating settlements than he will by trying lawsuits.

Far-sighted wisdom on the part of the individual lawyer himself would indicate that wise negotiation of fair settlements is in his own interest as well as that of his client.

What's New in the Law

The current product of courts, departments and agencies

George Rossman · EDITOR-IN-CHARGE

Richard B. Allen · ASSISTANT

Attorney and Client . . . *lawyer referral service*

The Jacksonville (Florida) Bar Association's lawyer referral service has passed muster before the Supreme Court of Florida.

Attacked in a declaratory judgment suit commenced by a lawyer who was not a member of the Jacksonville Bar Association, the referral plan was pronounced invalid by the trial court on the ground that advertising of the plan in newspapers and the telephone book violated Canons 27 and 28.

Reversing, the Supreme Court drew a distinction between individual lawyer advertising and bar association advertising. The Court remarked that the prohibition against advertising was grounded not only in the detraction of dignity of the profession that would result, but also in competition, which, it said, "is at the root of abuses in advertising".

The Court declared:

> . . . the advertising now before us represents the very antithesis of competition. Here is an organization of lawyers, which all in a given area may join, working cooperatively to lower the barrier between the legal profession and the public. Certainly the public must be attracted, and must be apprised of the availability of the service. . . . And alerting the public to the existence of a service, under bar sponsorship, which will provide . . . preventive [legal] advice at a reasonable fee is not unethical, but must redound to the benefit both of the public and the bar.

(*Jacksonville Bar Association* v. *Wilson*, Supreme Court of Florida, April 23, 1958, Hobson, 102 So. 2d 292.)

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

Constitutional Law . . . *state statutes*

On suit of the National Association for the Advancement of Colored People, the United States District Court for the Eastern District of Virginia has declared unconstitutional and enjoined the enforcement of three Virginia statutes and has continued the suit as to two other statutes until interpretations can be obtained from a state court.

All the acts involved were passed by the 1956 special session of the Virginia legislature. Another of that session's statutes—a pupil placement law—was struck down by a federal court in *Adkins* v. *School Board of City of Newport News*, 148 F. Supp. 430. That decision was affirmed by the Court of Appeals for the Fourth Circuit and the Supreme Court denied certiorari.

Two of the statutes were registration acts. They required registration of any person or corporation soliciting funds for the prosecution of suits in which he or it has no pecuniary interest, influencing legislation on behalf of any race or color, advocating racial segregation or integration, or raising funds for the employment of legal counsel in litigation on behalf of any race or color.

The three other statutes related generally to the practice of law. One redefined barratry in such a manner as to preclude the NAACP from following its long-standing custom of financing suits for individual Negroes. Two had the effect of redefining "runners" and "cappers" as persons or organizations who employ an attorney in connection with proceedings in which they have no pecuniary right or liability.

Examining the legislative history of the statutes, the Court had little doubt that they were intended to curtail, if not eliminate, the NAACP's activities and lawyers. It found that the five statutes "were passed to nullify as far as possible the effect of the [*School Segregation Cases*]".

It declared that the registration statutes and the barratry law were clear and unambiguous and that a federal court need not wait for a state court interpretation before judging their constitutionality. The registration statutes, it continued, were an unconstitutional curtailment of freedom of speech, and the barratry statute violated the equal protection clause of the Fourteenth Amendment because "it forbids the plaintiffs to defray the expense of racial litigation, while at the same time it legalizes the activities of legal aid societies that serve all needy persons in all sorts of litigation".

The Court felt that the language of the "runner" statutes was ambiguous and subject to several interpretations. For this reason, it did not rule on their constitutionality, but retained the complaints in order for the plaintiffs to bring suits in state courts to obtain interpretations.

One judge dissented vigorously. He thought that the Court had gone beyond permissible limits in determining legislative intent and that it should have waited for state court interpretation of all the acts.

(*National Association for the Advancement of Colored People* v. *Patty*, United States District Court, Eastern District of Virginia, January 21, 1958, Soper, J., 159 F. Supp. 503.)

Criminal Procedure . . . *trial misconduct*

A curiously incredible series of incidents at a Nebraska murder trial have resulted in the Court of Appeals for the Eighth Circuit affirming the grant of habeas corpus and a new trial to a condemned prisoner.

The defendant was being tried for the murder of a police officer, whose death was caused by a small-caliber bullet which penetrated the belt of his trousers. At the trial the State proved that the defendant was the only person

at the crime-scene with a gun that could possibly have been used; others present were shown to have had .38-caliber revolvers. The belt had been placed in evidence.

On the last day of the trial, after the reporter had brought in the exhibits but before the jury had assembled, the defendant's attorney was discovered enlarging the hole in the belt by means of a wooden dowel he had picked up from the reporter's desk. When the prosecutor saw this, he had the defense counsel taken to the judge's chambers, where unknown (to the record) events occurred. But prior to the final arguments and in the presence of the jury, the prosecutor made a statement for the record of the event and introduced the dowel as an exhibit.

The defendant was convicted and lost in an appeal to the Supreme Court of Nebraska. He then sought a writ of habeas corpus in a federal court. The district court concluded that the revelation to the jury of the defense attorney's "shameful act", made with an air of triumph by the prosecutor and under ostensible approval of the trial judge, served to destroy the defense attorney's effectiveness as counsel, thus depriving the accused of the effective assistance of counsel to which he was entitled under the due process clause of the Fourteenth Amendment.

Affirming this, the Eighth Circuit declared: "It is difficult to imagine how the effectiveness of a defendant's counsel could be more completely destroyed than by causing him to confess before the jury, at the close of the evidence at the trial, that he had been guilty of gross misconduct in having tampered with the State's evidence."

(*Bovey* v. *Grandsinger*, United States Court of Appeals, Eighth Circuit, April 7, 1958, Sanborn, J., 253 F. 2d 917.)

Fair Trade . . . *trading stamps*

No matter how you lick them, trading stamps amount to a cash discount, and when they are given in conjunction with the purchase of a fair-traded item they represent price-cutting forbidden by fair-trade laws. This is the decision of the Supreme Judicial Court of Massachusetts in ordering that a fair-trade manufacturer is entitled to injunctions to prevent retailers from passing out trading stamps on purchases of its products.

Massachusetts is one of the states where fair-trade laws, including non-signer provisions, have been upheld. The defendants were four grocery supermarket chains, two of which used trading stamps and two of which employed cash register tape plans. All the defendants were non-signers, but the manufacturer had established minimum resale prices on its items by contracts with others.

In considering the questions presented here in Massachusetts, some states, notably Pennsylvania and California, have ruled that trading-stamp plans do not violate fair-trade acts, while others, New York being the chief example, have found them illegal price-slashing. Preferring the New York reasoning, the Court declared that stamps and cash register tapes were price cuts and thus unfair competition under the fair-trade law. "The objective of the law", the Court said, "is to protect the good will of the trade mark owner, and when a commodity which bears a brand name is resold for less than the minimum price specified in the fair-trade contracts such conduct is a violation of the plain mandate of the fair-trade law and is properly restrained by injunctive relief."

The Court rejected an argument that its decision would be an undue, and thus unconstitutional, restriction on the issuance of trading stamps, which it had previously held could not be made unlawful by legislation. It remarked that the defendants had an undoubted right to issue stamps with all sales, but that that right could not be "exercised in such a way as to injure the rights of others". The Court went on to say that its decision did not prohibit issuance of trading stamps on fair-traded items, except in a manner that amounted to price-cutting, apparently implying that stamps might be issued if, for instance, the items were marked up by an amount equal to the cash discount represented by the stamps.

(*Colgate-Palmolive Company* v. *Elm Farm Foods Company*, Supreme Judicial Court of Massachusetts, March 11, 1958, Spalding, J., 148 N.E. 2d 861.)

Federal Employers' Act . . . *forum non conveniens*

The Supreme Court of Illinois, with one judge dissenting, has decided that the doctrine of *forum non conveniens* may be applied by Illinois state courts to Federal Employers' Liability Act suits, but that dismissals should be ordered only when the plaintiff is motivated "purely by vexation and harassment" and not for a "mere balance of conveniences". Then, applying its rule to the instant case, the Court affirmed the trial court's refusal to dismiss.

The ambulatory-venue provisions of the Federal Employers' Liability Act—or forum-shopping, as it has been termed—have been a fruitful source of controversy. Decisions of the Supreme Court of the United States have construed the provisions liberally and, until the enactment of §1404(a) of the Judicial Code, the doctrine of *forum non conveniens* was not applied by federal courts to F.E.L.A. actions. Now, under that section, transfers may be made "to any other district or division where it might have been brought". Some states, for example Missouri in *Missouri* ex rel. *Southern Railway Company* v. *Mayfield*, 240 S.W. 2d 106, have rejected the doctrine in F.E.L.A. cases, while others, as California in *Price* v. *Atchison, Topeka & Santa Fe Railway Company*, 268 P. 2d 457, have applied it.

While the Illinois Court has determined that F.E.L.A. suits may be dismissed under the doctrine, it has clearly indicated that dismissals will not be based simply on a consideration that the forum is inconvenient to the defendant. There must be considerably more in the picture than that, the Court announced.

Emphasizing the purpose of the Act to give plaintiffs latitude in selecting advantageous courts and generous juries, the Court declared that there must be a showing by the defendant that it is being harassed and vexed by the choice of forum. For instance, in the present case, where a refusal to dismiss was affirmed, the injury occurred in Covington, Kentucky, and the suit was commenced in East St.

Louis, some 350 miles away. The Court thought that the railroad's claims of inconvenience were exaggerated and that there was no vexation practiced by the plaintiff in selection of the forum.

(*Cotton* v. *Louisville and Nashville Railroad Company*, Supreme Court of Illinois, May 21, 1958, Bristow, J.)

Juries . . .
handbook

A jury handbook distributed with the endorsement of the trial judges of Hillsborough County, Florida, has received approval and compliments from the Supreme Court of Florida, which turned down a convicted defendant's contention that the handbook infringed on the statutory method of instructing juries.

After summarizing the handbook, the Court, remarking that jurors are not "ignoramuses", declared that the publication did not contain anything that "could possibly amount to a premature charge on any question that would cause a prospective juror to adopt an attitude that would interfere with the proper performance of his duties". Except for a passage in the handbook warning jurors not to interrogate witnesses, with which it did not entirely agree, the Court said the booklet "is pregnant with sound, sensible advice to persons needing it and capable of digesting it. . . ."

The handbooks were distributed to prospective jurors with their summonses and they were required to turn them in when they reported for service.

(*Ferrara* v. *Florida*, Supreme Court of Florida, March 26, 1958, rehearing denied April 28, 1958, Thomas, J., 101 So. 2d 797.)

Labor Law . . .
municipal licensing

The Court of Appeals for the Sixth Circuit has refused to enjoin the enforcement of a municipal ordinance requiring the licensing of "labor organizers and promoters" and "labor solicitors" and making it a misdemeanor to carry on those activities without a license. The ground of the Court's decision was a refusal to use its equity powers to enjoin as unconstitutional the operation of a criminal statute.

The ordinance, enacted in Russellville, Kentucky, establishes an annual license fee of $25, and provides that if the applicant answers all questions in the application, he is entitled to a license upon payment of the fee, with no discretion to refuse a license resting in any official. The trial court had struck down the ordinance on the ground that it interfered with a field in which Congress had "acted preemptively". The plaintiffs contended, additionally, that the ordinance abridged their freedom of speech in violation of the First and Fourteenth Amendments.

Reversing, the Sixth Circuit emphasized that federal courts of equity should refuse "to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent" (quoting from *Douglas* v. *Jeanette*, 319 U.S. 157). It pointed out that the constitutionality of the ordinance could be as well tested in a prosecution for failure to pay the license fee or by paying the fee under protest and proceeding in a state court to recover it.

The Court could not find the imminent threat of irreparable damage necessary to support equity's interference, and on this ground, plus the plaintiffs' ability to test the ordinance in a state court, distinguished the case from *Denton* v. *City of Carrollton*, 235 F. 2d 481 (42 A.B.A.J. 959; October, 1956).

(*Fuqua* v. *United Steelworkers of America (AFL-CIO)*, United States Court of Appeals, Sixth Circuit, March 28, 1958, Stewart, J., 253 F. 2d 594.)

Libel and Slander . . .
TV and politics

The Supreme Court of North Dakota has ruled that a farmers' organization has no action for libel against a television station which broadcast a political candidate's speech under the equal-time provision of §315 of the Communications Act of 1934, 47 U.S. C.A. §315.

The candidate was one of three vying for a United States Senate seat from North Dakota in 1956. The TV station had carried broadcasts of two of the candidates and the third demanded equal time. In his telecast he declared that both his opponents "take orders from communist-controlled, Democrat Farmers Union . . ." and that the Farmers Union program "would establish a Communist Farmers Union Soviet right here in North Dakota".

The Communications Act, in addition to providing for "equal opportunities" to all candidates, states that the broadcaster "shall have no power of censorship over the material broadcast under the provisions of this section". Relying on this, the TV station contended that it might not be sued for libel because it was obliged by law to transmit the broadcast.

With this argument the Court agreed. It noted the line of decisions establishing federal pre-emption of the field of radio communication, and said: "We cannot believe that it was the intent of Congress to compel a station to broadcast libelous statements and at the same time subject it to the risk of defending actions for damages."

The Court felt that the Act granted a species of privilege to the broadcaster and conceded that the libelous statements would have to be germane to the privileged subject matter for the privilege to be available. Holding the remarks about the farmers' organization germane to the senatorial campaign, the Court declared that "the voters are entitled to all available information as to the character and qualifications of candidates" and that an affinity for the Farmers Union was such information.

In passing, the Court noted that the plaintiff had an unimpaired right of action against the candidate himself. And it turned down the argument that a grant of immunity by the Communications Act would violate the due-process guarantees of the Fifth and Fourteenth Amendments.

One judge dissented. He agreed that §315 insulated the broadcaster from a libel action, but only to the extent that the section deprived the broadcaster of its right of censorship. And

here, he said, the libelous material concerned an "innocent bystander" to the political contest and the material was not privileged because it was not within the scope of the campaign.

(*Farmers Educational and Cooperative Union of North America* v. *WDAY, Inc.*, Supreme Court of North Dakota, April 3, 1958, Sathre, J., 89 N.W. 2d 102.)

Military Law . . . *applicability to civilians*

Going the next step beyond *U.S.* ex rel. *Guagliardo* v. *McElroy*, 158 F. Supp. 171 (44 A.B.A.J. 365; April, 1958), the United States District Court for the Middle District of Pennsylvania has ruled that a civilian employee of the Armed Forces serving overseas is subject to trial by court martial for a capital offense. *Guagliardo* concerned the same point, but the offense there was non-capital.

The petitioner for a writ of habeas corpus in the instant case had been convicted by a court martial in France of the unpremeditated murder of his wife. He was tried under authority of Article 2(11) of the Uniform Code of Military Justice, 10 U.S.C.A. §802 (11), which subjects persons employed by the Armed Forces outside the continental limits of the United States to military law and court-martial jurisdiction.

Without making an extensive exposition of its position, but referring to the recent cases in which the perplexing question of court-martial jurisdiction of "civilians" has been considered, the Court held the petitioner in the instant case subject to military law. It dismissed his arguments that he had been deprived of his constitutional rights to indictment and trial by jury and that jurisdiction over his crime rested only with France.

(*Grisham* v. *Taylor*, United States District Court, Middle District of Pennsylvania, April 22, 1958, Follmer, J.)

Practice of Law . . . *state license*

Admission to practice in a federal court does not qualify one to hold himself out as an attorney in or to practice law in a state to whose Bar he is not admitted. This is the decision of the Supreme Court of Pennsylvania, with two judges dissenting.

The Court approved an injunction against a man not licensed in Pennsylvania, but admitted to the Bars of the United States Supreme Court, the Court of Appeals for the District of Columbia Circuit and the United States District Courts for the Districts of Eastern Pennsylvania and the District of Columbia. He maintained an office in Philadelphia. The injunction enjoins him from practicing law in Philadelphia County and from advertising in that county that he practices law or is authorized to practice law in any state, nation, country or land.

The Court asserted that the states have not ceded to the Federal Government the right to regulate the licensing of lawyers. It rejected the defendant's distinction that he was entitled to a sort of hybrid practice consisting only of "federal questions". These questions, the Court said, when federal taxation and federal due process are considered, encompass about everything. It concluded: "The real point concerns practicing law of any kind and being subject to regulation as to mental and character fitness in the public interest."

The Court interpreted the injunction as not preventing practice in the courts in which the defendant was admitted, but on this point the two dissenters thought the injunction went too far by precluding the practice of law in Philadelphia County, inasmuch as a federal court, in which the defendant was admittedly entitled to practice, was located in that county.

(*Ginsburg* v. *Kovrak*, Supreme Court of Pennsylvania, March 24, 1958, *per curiam*, 139 A. 2d 889.)

United States . . . *citizenship*

A person with dual United States-Philippine citizenship does not lose his United States citizenship by signing an oath in a passport application to support the Philippine Constitution, according to the Court of Appeals for the Third Circuit.

The declaratory-judgment plaintiff had acquired his United States citizenship by virtue of birth in Pennsylvania, as the child of a Philippine father and American mother. He went to the Philippines as an infant, and in 1946, when he was an adult, he acquired Philippines citizenship when the Islands became an independent nation. Knowing that he was a citizen of the Republic of the Philippines but unaware that he had retained his United States citizenship, he sought a Philippines passport in 1952 and, as part of the regular application swore that he would "support and defend the Constitution of the Philippines. . . ."

The United States contended that this act was the "taking of an oath or making an affirmation or other formal declaration of allegiance to a foreign state" which under §401(b) of the Nationality Act of 1940, 8 U.S.C.A. §801(b), deprived him of his United States citizenship.

But the Court did not agree. It declared that dual citizenship implies some degree of dual allegiance, and stated "the decisive point . . . is that conduct merely declaratory of what one national aspect of dual citizenship necessarily connotes, cannot reasonably be construed as an act of renunciation of the other national aspect of the actor's dual status". Emphasizing that the passport application was the exercise of a "routine privilege of Philippine citizenship", the Court concluded that the oath was not a derogation of the American aspect of dual citizenship.

The Court pointed to the recent United States Supreme Court denationalization cases—*Perez* v. *Brownell*, 78 S. Ct. 568, *Trop* v. *Dulles*, 78 S. Ct. 590, and *Nishikawa* v. *Dulles*, 78 S. Ct. 612—as showing the application of constitutional limitations on the congressional power to provide for loss of citizenship. Although in the basic *Perez* decision the Supreme Court held that voting in a foreign election supported loss of citizenship, the Third Circuit remarked that it thought the Supreme Court has "gone no further than to approve forfeiture of citizenship . . . where the nature and circumstances of the allegedly expatriating conduct have been such as to indicate some flouting of obligations inherent in American

citizenship, if not an implied renunciation of the tie."

(*Jalbuena* v. *Dulles*, United States Court of Appeals, Third Circuit, April 11, 1958, Hastie, J.)

What's Happened Since . . .

■ On May 5, 1958, the Supreme Court of the United States:

DENIED CERTIORARI in *Socialist Party, U.S.A.* v. *Jordan*, 318 P. 2d 479 (44 A.B.A.J. 264; March, 1958), leaving in effect the decision of the Supreme Court of California that California's numerical restriction statute relating to qualification of a political party for the primary ballot is reasonable, does not exclude any substantial political group and is within the state's constitutional provision.

■ On May 19, 1958, the Supreme Court of the United States:

AFFIRMED (5-to-3) the decision of the Supreme Court of New Jersey in *New Jersey* v. *Hoag*, 122 A. 2d 628 (42 A.B.A.J. 860; September, 1956), that a conviction for robbing one tavern patron, secured after the defendant's acquittal of robbing three other patrons at the same time, does not violate any constitutional guarantee against double jeopardy and the defendant is not entitled to a benefit from the doctrine of collateral estoppel on the ground that the state's witnesses at the first trial failed to identify him.

Books for Lawyers

(Continued from page 675)

produced under the title *The Right of the People*, a theme close to the heart of the Justice as evidenced by the major portion of his prior works. "These are the rights", says he, "that distinguish us from all totalitarian regimes".

In the lecture on "Freedom of Expression" there is an extended treatment of the history, philosophy and application of the First Amendment discussed in the light of his thesis that ". . . there is no free speech in the full meaning of the term unless there is freedom to challenge the very postulates on which the existing regime rests". After treating classic quotations from Jefferson, Mill and others, the Justice states: "Those who doubt the thesis that man needs full freedom of expression to realize his utmost capacities and become a cultured citizen of the world need only visit the totalitarian states and see how man has shrivelled under the impact of censorship, how poorly he has fared under the diet of one creed". He treats of some of the leading cases on the subject but fails to indicate (at least in the book) where some of the views he advocates here are in dissent from those of his brethren on the Supreme Court.

The second lecture employs the striking title of "The Right To Be Let Alone" and discusses the right to privacy, legislative investigations, loyalty investigations, loyalty oaths, the dignity of man and the right to defy an unconstitutional statute. Under the topic of the dignity of man, he considers self-incrimination, searches and seizures, due process of law. detention of suspects, wire-tapping, confessions and third degrees. "I have said enough", he concludes, "to indicate that the right to be let alone, though greatly impaired in recent years, still clamors for recognition. It is a sturdy part of our heritage, more American than European, more Western than Eastern. It cannot be easily stamped out on this continent, for it is a part of all of us. It can be eroded and depreciated. But it will always be one of our great rallying points".

The final lecture on "The Civilian Authority" takes a detour through the areas of conflict between the military and civilian control, particularly as exemplified in recent controversy in "the most extravagant" situations in Hawaii during World War II. He concludes this section with the provocative observation "A far more significant inquiry would be how to keep the formulation of foreign policy out of the Pentagon, how to break up the alliance between big business and the Armed Forces, how to restore to the diplomats the problem of maintaining political equilibrium in the world. . . . For as Briand said to Lloyd George in World War I, 'War is much too serious a thing to be left to military men' ".

One may readily disagree with Justice Douglas on some of the conclusions he reaches during the course of his discussion—and surely in the light of his thesis he would be the first to grant this right to the people—yet none can gainsay the eloquence and vigor with which the ideas are here presented.

LESTER E. DENONN
New York, New York

BASIC PENSION AND PROFIT-SHARING PLANS. *By Leon L. Rice, Jr., and Edward H. Schlaudt. Published by the Committee on Continuing Legal Education of The American Law Institute collaborating with the American Bar Association, 133 South 36th Street, Philadelphia 4, Pennsylvania. 1957. $3.00. Pages 148.*

This is another of a series of practical tax handbooks published by the Committee on Continuing Legal Education. Its aim is to acquaint the general practitioner with many of the everyday tax problems of tax qualified pension and profit-sharing plans. The book contains a detailed but simplified explanation of the relevant provisions of the 1954 Internal Revenue Code and of the Regulations and rulings issued thereunder.

The book also contains an extensive chapter on pension costs, and explains the effects of factors such as mortality, age and length of service, turnover, methods of spreading costs, etc.

Finally, the appendix sets out in full the complete text of the Treasury Department Regulations issued under the 1954 Code.

The co-authors are lawyers who have had many years of practical experience in the field of employee benefit and deferred compensation plans.

JOHN E. MULDER
Philadelphia, Pennsylvania

Tax Notes

Prepared by Committee on Publications, Section of Taxation, Francis W. Sams, Chairman.

Proxy Battle Expenses: Federal Tax Deduction

by George D. Webster, Washington, D. C.

One of the significant recent developments in the history of the American corporate enterprise is the emergence of the proxy battle. In the case of the large corporation, professional proxy solicitors, wide publicity, including full page advertisements, and public relation firms, are the usual and accepted means of getting out the shareholder vote to the corporate polls.[1] In addition, there are certain legal, accounting, clerical, administrative, travel and related expenses which are incurred.

The expenses of some of these contests have been considerable; this factor has in part been responsible for there being as yet no formal position by the Internal Revenue Service in respect to the deductibility of such expenses for federal income tax purposes. Informally, the Service holds that such expenses are not deductible but must be capitalized in all instances —whether incurred or ultimately borne by the corporation, by an insurgent shareholders' group or by a "raider" group. This position is unjustified.[2]

Initially, there are two relevant, basic groups of principles—corporate and taxation—which should be briefly discussed.

Corporate. Ordinarily management expenses are defrayed directly by the corporation. The only basic requirements for a proper expense are that it be incurred for a corporate purpose and that it be reasonable in amount. In this connection it should be noted that it is illegal for management to spend corporate funds for the single purpose of retaining control. *Peel* v. *London and North Western Ry.*, [1907] 1 Ch. 5 (C.A. 1906). However, if the funds are expended in a policy (rather than personal) contest, there is a benefit to the corporation and its stockholders, and the expenses are thus proper. It seems to follow that an argument can always be made that a contest involves a matter of policy.

The same "personal v. policy" principle is applicable as to whether or not there can be reimbursement by the corporation. A number of cases have permitted reimbursement of management; two recent cases have permitted the reimbursement of successful insurgents. *Rosenfeld* v. *Fairchild Engine and Airplane Corp.*, 309 N. Y. 168, 128 N.E. 2d 291 (1955); *Steinberg* v. *Adams*, 90 F. Supp. 604 (S.D.N.Y. 1950). There is no judicial authority for the reimbursement of unsuccessful insurgents, (*Cf. Phillips* v. *United Corporation*, Civ. No. 40—497, S.D.N.Y., May 26, 1948, appeal dismissed, 171 F. 2d 180 (2d Cir., 1948)), but such reimbursement does have some support in the commentaries. Since such an insurgent has been rejected by the stockholders, the corporate benefit is more difficult to prove. To be distinguished is the case of "raiding the raider" in order to protect the corporation. This is the case of the management of Corporation *A* becoming an insurgent group in Corporation *B* in order to protect the corporation from the management of Corporation *B* which is an insurgent in Corporation *A*. The reimbursement of these expenses (expended by Corporation *A*) would generally be proper since there is clearly a corporate benefit. *Cf. Kaufman* v. *Wolfson*, 153 F. Supp. 253 (S.D.N.Y. 1957).

Taxation. The applicable basic principles for deductibility under federal tax law are several. The expenses must meet the requisite tests, including the ordinary and necessary test, of Sections 162 and 212 of the Internal Revenue Code of 1954. Capital expenses (such as defenses of title to property) may not be deducted but may only be depreciated ratably. In the case of an individual, the treatment of proxy battle expenses as capital items results in an increase in the basis of stock, and the benefit therefrom is realized upon sale. In the case of a corporation, it may be that any deduction is precluded (if the expenses are capitalized) since there would be no means of amortization. The sale of the assets of the corporation is possibly the only way that a benefit could be realized.

Also relevant to the question of federal tax treatment is the motive for the expense. The stockholder enters the fight to protect his stock, to enhance its value, to make the stock more productive, for personal satisfaction (control or a directorship) or to promote corporate democracy. The corporate motive is stated to be for the benefit of the stockholders generally. To be considered here also is the fact that in the case of the individual stockholder group the expenses are sometimes in excess of the value of the stock ownership.

It would seem proper that regardless of who ultimately bears the expense and regardless of motive that the expenses of such contests should uniformly be deductible as business expenses under Section 162 or as nonbusiness expenses under Section 212 (in the case of the individual). These expenses are necessary. They are ordinary in the *Welch* v. *Helvering*, 290 U. S. 111 (1933) sense.[3] They do not constitute a defense of title to property. Even though they may benefit all shareholders (as a derivative

1. See Karr, *Fight for Control* (1956); Aranow and Einhorn, *Proxy Contests for Corporate Control* (1957); Caplin, *Proxies, Annual Meetings and Corporate Democracy: The Lawyer's Role*, 37 VA. L. REV. 653 (1951); Friedman, *Expenses of Corporate Proxy Contests*, 51 COL. L. REV. 951 (1951); Armstrong, *Regulation of Proxy Contests by the SEC*, 42 VA. L. REV. 1075 (1956); Orick, *The Revised Proxy Rules of the Securities and Exchange Commission*, 16 FED. BAR J. 11 (1956); Brochl, *What Is Behind the Proxy Battles*, 45 MANAGEMENT REV. 9 (1956); Gilbert, EIGHTEENTH ANNUAL REPORT OF STOCKHOLDER ACTIVITIES AT CORPORATION MEETINGS DURING 1957 (1958).

2. For an excellent and full treatment of this subject, see Note, *Proxy Fight Expenses: Problems of Tax Deduction*, 43 VA. L. REV. 891 (1957). The author concludes (page 912): "These cases which shed any light upon the deductibility of shareholder-management fight expenses are not favorable to the taxpayer". This article was published prior to the decision in *Shoe Corporation of America*, 29 T. C. No. 33 (1957) and *Ingalls v. Patterson*, 158 F. 2d 627 (N.D. Ala. 1958).

3. Mr. Justice Cardozo stated (page 114): "A lawsuit affecting the safety of a business may happen once in a lifetime. The counsel fees may be so heavy that repetition is unlikely. None the less, the experience is an ordinary one . . .".

suit), this is not the primary reason why an individual incurs such expenses.

Recent cases. There are no reported cases involving the deductibility of proxy expenses. Some of the earlier cases in similar situations are not favorable to the taxpayer's position. However, several recent cases involving the related situations of derivative suits and non-proxy fights in a corporation support deductibility. In *Alleghany Corporation*, 28 T. C. 298 (1957) (acq.), the taxpayer corporation expended in excess of $500,000 opposing several reorganization plans of the Missouri Pacific Railroad Company, of which it owned over 50 per cent of the stock. The Tax Court held (Judge Turner dissenting) that the expenses were deductible, being within the scope of the taxpayer's business, *i.e.*, investment in and management of securities of other corporations. The expenses were incurred to protect the investment of the corporation. The Government argued that these expenses were indistinguishable from those of perfecting or protecting title to property.

A few months later, *Shoe Corporation of America*, 29 T.C. No. 33 (1957) was decided. There, a minority shareholder of the taxpayer corporation instituted a stockholder's derivative suit, in which the taxpayer and some of its officers were joined as defendants. The officers and directors were enjoined from issuing certain Class B stock, and the minority stockholder's attorney and accounting fees and expenses were taxed to the taxpayer corporation by the District Court. The Government unsuccessfully contended that the expenses were not deductible as business expenses by the corporation because (1) they were not taxpayer's fees, (2) they were not ordinary in nor related to the taxpayer's business, and (3) they were capital in nature. With respect to the argument of the Commissioner as to the capital nature of the expenses, Judge Bruce stated:

> The stockholders' suit out of which the payments arose was not one to defend, protect or perfect *title* to property but was one to enjoin the carrying into effect of a plan of recapitalization which the District Court found would constitute a breach of the fiduciary obligation which the directors owed to all the shareholders and which, if carried into effect would vest all control of the corporation in the Schiff family, and might result in depriving the corporation of competent management.
>
> Respondent is apparently confusing expenditures incident to the defense, protection or perfection of title to property with expenses paid or incurred for the management, conservation, or maintenance of property held for the production of income, Section 23(a)(2), Internal Revenue Code of 1939. On brief he states that "The action out of which these fees arose was one brought to prevent the diminution of the value and rights of petitioner's Class 'A' stock. It was that protection of property which prompted Mrs. Kahn's action. . . ." And further, "Her suit was brought to protect her property, her Class 'A' stock." This indicates conservation of property rather than defense of title.
>
> *Obviously, had Mrs. Kahn been required to pay the fees and expenses of the attorneys and accountants she would have been entitled to deduct such expenses from her gross income under section 23(a)(2). However, apparently because he considered the action beneficial not only to Mrs. Kahn but to all other shareholders as well as the corporation, the District Court assessed such fees and expenses as costs and directed the corporation to pay them.* [Italics supplied.]

One later case should be noted, *Ingalls* v. *Patterson*, 158 F. 2d 627 (N.D. Ala., 1958) (and the companion case, *Ingalls Iron Works Co.* v. *Patterson*, 1-U.S.T.C. ¶9241 (N.D. Ala., 1958)). There, an executive of a family corporation was removed from office as a result of a family dispute. He filed various suits in an attempt to regain his position, to protect his stock from being bought under an option and to protect dividend income. After his father's death, the litigating executive was made chief officer of the company. The legal expenses incurred by the executive were held to be deductible.

It would seem that the results reached in these cases would dictate the deductibility of most proxy fight expenses. The motives involved are similar: to protect the stock investment, to enhance the value of the investment, and to seek or retain control of a corporation. Accordingly, since such expenses are not capital in nature, proxy expenses should not be so considered. Such expenses are no more normal or routine than proxy expenses. Such expenses are no more necessary than proxy expenses. Also, the Tax Court in *Shoe Corporation of America, supra*, rejected the unrealistic argument that the expenses there were not deductible because other shareholders were benefited. The Court is really concluding that stockholders are not that altruistic; monies are expended for a business or investment reason personal to the shareholder.

Generally, it would not seem to make any difference on the question of deductibility as to who bears the proxy expenses. The reasons for the expenditure may be different, but this should not affect the result here. However, it may be argued that a corporation is more clearly entitled to a deduction than an individual or a group of individuals. A proxy fight may be so disruptive of the business of the corporation that the expenses incurred are the most necessary item to keep the company on a competitive basis in the industry.

There is one further question where the corporation is involved. For instance, there may be some doubt in deciding to whom the expense actually belongs. In many battles there are two opposing groups of shareholders and the corporation may be merely a nominal party. In this connection, there should be considered *Knight-Campbell Music Co.* v. *Commissioner*, 155 F. 2d 837 (10th Cir. 1946). There a preferred shareholder sued the director-shareholders in respect to certain *ultra vires* acts. A judgment against the directors was obtained in favor of the corporation. In this same action, the directors managed to place the corporation in receivership with resulting business damage. A settlement was finally reached whereby the directors, incurring large legal expenses, were able to remove the corporation from receivership. The corporation then cancelled its judgment against them. Although the corporation obviously benefited by this settlement, it was not allowed to deduct reimbursement of the director's legal expenses because their primary motive in entering the settlement was to obtain the cancellation of the judgment; any benefit which the

(Continued on page 690)

OUR YOUNGER LAWYERS

Frank C. Jones, Macon, Georgia, Editor-in-Charge



Charles O. Brizius, Administrative Assistant, Junior Bar Conference.

Richard F. Alden, of Los Angeles, Chairman of the J.B.C. Annual Meeting Committee, has announced final plans for the forthcoming annual meeting to be held in Los Angeles. Junior Bar events are scheduled for the period from Friday, August 22, through Tuesday, August 26.

Serving as J.B.C. Headquarters will be the Biltmore Hotel, which is less than five blocks from the Statler Hotel, headquarters for the Association. A registration desk for delegates will be operated at the Biltmore continuously for the first two or three days, and throughout the meeting at appropriate times a hospitality room will be maintained.

Social activities will get under way with the annual Candidates' Cocktail Party to be held on Friday evening, August 22, with the location to be announced later. On Saturday morning, August 23, there will be an organizational meeting of the Conference Assembly, which is established by Article IV of the revised by-laws. The Assembly, which will establish the general policy of the Conference, hear all committee and council reports and all resolutions and such other matters as may affect the general welfare of the Conference, is composed of two delegates from each state and one delegate from each affiliated local unit. The method of selecting delegates to the Conference Assembly is left to the state or local affiliated units involved; delegates must be certified at least two weeks prior to the annual meeting. Following a luncheon the Conference Assembly will again meet to receive committee reports.

Highlight of the social agenda will be the dinner-dance on Saturday evening which is scheduled for the swank Beverly-Hilton Hotel beginning at 9:00 P.M. Preceding this and beginning at 7:00 P.M. at the same hotel there will be a reception sponsored by the Los Angeles Bar Association.

Meetings of the Awards of Merit, Resolutions, and Nominating Committees are scheduled for Sunday, August 24, in addition to a meeting of the Executive Council. Trips to the ocean area and other diversions of a social nature have been arranged. No event is scheduled for Sunday evening so as to leave Conference personnel free to attend the President's Reception.

The annual Conference luncheon on Monday will be followed by a general session, at which time reports of the above mentioned committees will be received and new officers for the year will be elected. The final business event on the program is a meeting on Tuesday morning, August 26, of the old and new Executive Councils.

Other members of the Annual Meeting Committee who are serving as chairmen of various subcommittees are: Karl Davis, Jr., William P. Hogoboom, Mrs. Barbara D. Henson, David Massey, Joseph D. Mullender, Clifford Anderson, Dudley Wright, Alden Pearce, William Cruikshank, Frank DeMarco, Lester E. Olson, C. Robert Wilmsen and Richard Barger, all of Los Angeles.

Award of Merit Rules Announced

Rules governing applications for awards of merit were recently promulgated by Chairman Richard H. Allen, of Memphis. Generally, all applications must be typewritten or mimeographed or duplicated by accepted duplicating processes; must contain a brief history of the organization; should include exhibits wherever possible; should be bound in manilla folders by metal fasteners; must be filed in triplicate; and must be received by the Chairman of the Annual Meeting Committee not later than midnight of Wednesday, August 20. Winning applications will be reproduced at the American Bar Center and circulated throughout the Conference.

For state units there will be three awards, as follows: (a) an award of "State Junior Bar of the Year" for the *best* unit; (b) an "Award of Progress" to the state unit or units (not over two) which, in the decision of the judges, manifests the most progress over-all during the preceding year; and (c) an "Award of Honorable Mention" which can be made under either category (a) or (b) to either one or two units.

Applications of local units shall be divided into two categories, *viz.*, one for units in cities having a population in excess of 500,000, and the other for units in cities having a population of less than 500,000. The same types of awards will be given as in the case of state units.

Serving as Vice Chairmen of this Committee are: Arthur H. Gemmer, Indianapolis; Lewis A. Dysart, Kansas City, Missouri; E. Ellison Walker, Columbia, South Carolina; Lewis H. Hill III, Tampa; Timothy E. Kelley, Dallas. Council adviser is Gibson Gayle, Jr., of Houston.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

The vital role of legislation in the increasingly important field of conservation is well illustrated in this article. Mr. Ziegler describes the legal and administrative difficulties involved in preparing a comprehensive statute dealing with water use and presents the solutions suggested by the draftsmen.

The Model Water Use Act

By Wilbert L. Ziegler
Legislative Analyst, Legislative Research Center, University of Michigan Law School

The demand for water supplies has been growing continually throughout the United States. An increasing population, greater consumption per capita, expanding economic and recreational activity, and supplemental irrigation as a standard farming procedure are but a few of the many causes assigned for the increasing use of water.

State legislatures in their efforts to ward off a threatened water supply crisis have been faced with the problems of (1) facilitating the development and conservation of new water supplies and (2) providing for the maximum beneficial utilization of existing supplies. The need for development of new supplies has prompted legislative consideration of enabling acts permitting, for example, the formation of conservancy districts. Legislative efforts to provide for the maximum beneficial utilization of existing available water usually have resulted in a changing of the existing water rights laws and the adoption of state management of the water resources.

It was the increasing activity of the state legislatures in the area of water use that first attracted the attention of the Legislative Research Center of the University of Michigan and led ultimately to its research endeavors in the area of water use law. In July, 1956, a staff of three lawyers from the Research Center, under the supervision of William J. Pierce, Director, undertook an analysis of state water rights law providing for the maximum beneficial use of existing water supplies. This research laid the basis for subsequent papers written on the topics of present statutory and common law regulation. After considerable study, various inadequacies of existing water rights laws became evident and the staff directed its efforts toward the formulation of a water use act which would provide, as far as possible, for the most beneficial use of existing water resources. The results of this endeavor culminated in the production of the Model Water Use Act and several research papers covering various legal aspects of a change in water use law.

The Model Water Use Act provides for the establishment of a state commission, constituted according to the requirements of the individual state, which has comprehensive and paramount control over all the water resources of the state. The commission is charged with the duty of planning for the beneficial development of the state's water resources, of regulating certain water uses in accordance with the provisions of the Act, and of representing the state in its dealings with the United States or individual states.

The uses of ground water and surface streams and lakes which are specifically regulated under the Act include (1) the withdrawal of water directly from any of these sources, (2) the application of water for the production of power, and (3) the impounding by any dam, waterway obstruction, or reservoir of any surface stream or lake. Except for a domestic use, any of the regulated uses being made at the effective date of the Act or within three years prior, or to be made in conjunction with facilities under construction at the effective date, are classed as "preserved" uses. All other regulated uses not falling within the classification of a "preserved" use are classed as "permitted" uses, subject to the "permit" provisions of the Act.

A "preserved" use, if lawful, reasonable and consistent with the public interest in the proper utilization of the water resources of the state, may be certified by the user upon application to the state agency. Thereupon the use may be continued and will be protected from interference by subsequent "permitted" uses so long as it continues to be beneficial and is not terminated by non-use for a period of three years.

After the effective date of the Act, except for "preserved" uses and domestic uses, (1) no regulated use of water may be made, (2) no diffused surface water may be impounded (over a specified quantity), and (3) no state or local governmental unit may contract to obtain a supply of water from a person not holding a permit unless a permit is obtained from the commission. A permit is granted (1) if there is water available, (2) if the use is beneficial and the most beneficial use and development of the water resources of the state will not be impaired, and (3) if the new use will not substantially and materially interfere with "preserved", domestic, or "permitted" uses made previously, whether they are uses of surface, ground or diffused surface waters. A permit is granted for a specified length of time not to exceed fifty years, and it is granted without regard to whether, under the law of the state prior to the effective date of the Act, the use could have been maintained only in connection with specific lands, a particular natural watershed, or otherwise. Other provisions of the Act relating to the permit provide for renewal, revocation and fees for permits.

In the procedures for determining the certification of a "preserved" use or the granting of a permit for a new

use, much care has been taken to protect and guarantee the constitutional requirements of due process of law. Each applicant or any person adversely affected by certification of a "preserved" use or granting of a permit is entitled to a hearing by the commission and has a right of appeal therefrom to the state courts. The Act further provides that if any use authorized under a permit results in an injury to any property rights, the injured person is entitled to compensation for actual damages in a suitable action against the permit holder.

Besides determining what regulated uses will be permitted to exist, the commission is charged with the duty of distributing available water in time of shortage. Whenever the quantity of surface or ground water is or may become insufficient to supply all users thereof or whenever the ground water table in any area of the state is progressively declining, a "shortage" of water exists under the Act. In order to obtain the most beneficial use of the available water and to protect the public health, safety and welfare and the interests of affected users during the "shortage", the commission may prevent the initiation of new or the modification of existing uses, apportion, limit or rotate available water among some or all existing users, and make other necessary regulations. In the exercise of these broad powers, domestic uses are given the highest priority and "preserved" uses are preferred to uses of water made pursuant to permits. If a shortage should ever occur which threatens the public health, safety and welfare, and the "shortage" powers are not sufficient to protect the public, an "emergency" exists. In this situation, the agency has the power to authorize any affected state or local governmental unit or public water supplier to enter on public or private property and take a supply of water necessary to overcome the "emergency". This solution is only temporary, however.

In regulating various uses of water through a permit system administered by a state agency, the Model Water Use Act attempts to utilize the desirable features of the riparian doctrine and the prior appropriation system. The doctrine of riparian rights, applying the criterion of reasonable use to determine on a case by case approach what uses of water will be sanctioned, is a flexible theory allowing for instantaneous adjustment of water uses to accommodate a shift in the state's developmental pattern. However, in times when an adequate supply of water is not available for all users, this flexibility discourages economic investment based on the use of water. On the other hand, the doctrine of prior appropriation, granting a right to a determined quantity of water, for a particular use, forever, possesses the attribute of stability necessary to encourage investment, but the doctrine makes very little allowance for an adjustment of uses to meet changing conditions and implies, in times of shortage, a distributing of available water on the basis of priority in time of application which may not constitute the most beneficial use of water under the circumstances. In formulating the Model Water Use Act, the attempt was made to weave a water rights doctrine possessing the stability of the prior appropriation theory yet retaining a degree of the flexibility of the doctrine of riparian rights.

Finally, suggested for inclusion within the Act is a water pollution control section administered by the commission along with its regulation of water uses. The waste assimilation capacity of a body of water is determined greatly by its quantity, and intelligent comprehensive planning and administration of a state's water resources demand that waste assimilation, consumptive uses and non-consumptive uses be regulated by one agency.

The principal areas of conflict concerning the Act fundamentally may be reduced to very few. The Act has been questioned as a valid exercise of the police power of the state and this conflict prompted an extensive study of the relevant legal issues. The study concludes that the Act is constitutional. Another conflict centers about the question of the desirability of establishing extensive state regulation as opposed to establishing local control or maintaining the *status quo*. Other arguments involve special interests fighting for preferences or greater recognition.

Since the Act was first presented in a complete form, it has undergone four total revisions. It formed the basis for a water law conference held at the University of Michigan Law School in September, 1957. Changes and revisions have resulted from criticism and advice rendered to the staff by faculty members of various departments on the University of Michigan campus and by a host of others concerned with the problem of water conservation and water use regulation. Members of the Water Law Committee of the Commissioners on Uniform State Laws have given valuable time and assistance in the formulation and production of the Act. This Committee has approved the Act and recommended it for adoption by the Commissioners on Uniform State Laws as a model act. The Model Water Use Act, several monographs concerning existing water law and problems in changing water laws, and a detailed study of Michigan water law, are being published in a volume by the Legislative Research Center.

Tax Notes

(Continued from page 687)

corporation received was incidental.

Conclusion. Despite the results in these recent cases, litigation will no doubt finally resolve the question as to the deductibility of proxy battle expenses. In addition to the tax considerations already discussed favoring deductibility, one non-tax factor should be mentioned. The rules and regulations of the Securities and Exchange Commission are designed to encourage stockholder participation in a company's affairs and to require management to report accurately on its stewardship. Such participation cannot fully be encouraged unless the expenses of such participation are deductible for federal income tax purposes.[4]

4. *Cf.* Rev. Rul. 56-511, 1956—2 C.B. 170 which holds that travel expenses incurred in attending a stockholders' meeting are not deductible. This ruling is narrow and is probably limited to the situation when the "stockholder" is a prospective investor in the company and not a present stockholder.

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe, Washington, D. C., Editor-in-Charge

ANTITRUST: Without much question the best young writer in this field is Frederick M. Rowe, of the Washington, D. C., Bar. Good it is to know that Fred is embalming all his pieces ("Price Discrimination", 60 *Yale Law Journal* 929; "Sections 2 and 3 of Robinson-Patman", 1956 *A.B.A. Antitrust Section Report* 60; "Price Differentials", 66 *Yale Law Journal* 1; "Section 2c—2f", 1957 *C.C.H. Antitrust Law Symposium* 124; and his most recent article "The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective", 57 *Columbia Law Review* 1059) into a new text book on the Robinson-Patman Act to be published by Little, Brown of Boston. This is badly needed. To date the best and almost the only books are the American Law Institute pamphlet of Austin published by the American Law Institute, 133 South 36th Street, Philadelphia, Pennsylvania, and Wright Patman's book, *The Robinson-Patman Act* published in 1938 by the Ronald Press.

This recent article of Rowe's about the enactment of the Robinson-Patman Act is perhaps in many ways the best of all he has written. It has a light and airy touch that is delightful and his picture of the congressional fight in the House between Mr. Patman and Mr. Celler and in the Senate between Senator Robinson and Senator Borah is priceless reading. Timely too, when at the October, 1957, Term the Supreme Court granted certiorari for so many Robinson-Patman Act cases, *Nashville* v. *Carnation Milk Co.*, 7th Circuit, 238 F. 2d 86, Docket 67, and *Safeway Stores, Inc.* v. *Vance*, 10th Circuit, 239 F. 2d 144, where on January 21, 1958, the Supreme Court ruled that no treble damage action will lie under Section 3 of the Robinson-Patman Act which came into the act from the Borah-Van Nuys bill because the section is limited to criminal actions, 26 U.S. Law Week 4105; *Moog Industries* v. *F.T.C.*, 8th Circuit, 238 F. 2d 43, Docket 77, and *F.T.C.* v. *C. E. Niehoff and Co.*, 7th Circuit, 241 F. 2d 37, Docket 110, where the question was whether a Court of Appeals can postpone a valid cease and desist order of the F.T.C. until similar orders are made against competitors and Mr. Justice Per Curiam, as Senator Ervin of North Carolina is wont to dub him, on January 27, 1938, referred the question to the F.T.C., 26 United States Law Week 4115; and *Federal Trade Commission* v. *Standard Oil Co.*, 7th Circuit, 233 F. 2d 649, Docket 24, where after seventeen years of litigation the Supreme Court finally held that Standard of Indiana acted in good faith in selling gas to four Detroit concerns at prices below what it sold to its own dealers, 26 United States Law Week 4111.

At an equally opportune time along comes a two-issue symposium in the *Vanderbilt Law Review* entitled "Trade Practices and Regulations" which is one of many words for "Antitrust". The issues cost two dollars each and you obtain them by writing to Vanderbilt Law School in Nashville, Tennessee. The Southland at Vanderbilt with its symposia issues and Duke with its *Law and Contemporary Problems* give our profession annually very valuable legal materials.

Vanderbilt's two antitrust issues look to me to be up to their high standard.

On antitrust abroad, G. W. Haight, counsel for Shell Oil Company, Morrison, a Middle Temple barrister, and Professor Kronstein of Georgetown Law School write.

On the Robinson-Patman Act, Wright Patman himself writes in support of his bill, H.R. 11, and Senator Kefauver's S. 11 in the 85th Congress to reverse Standard Oil of Indiana's victory in its Detroit case, decided in favor of Standard Oil at the October, 1957, Term (26 United States Law Week 111). Mr. Carlston presents the opposition argument and under the clever title "Babel Revisited" Mr. Fisher examines 2(d) and 3 of the Robinson-Patman Act.

On antitrust decrees, Philip Marcus of the Department of Justice writes.

On mergers, especially the *du Pont-General Motors* case, James Hart and Joseph W. Burns write.

Reynolds Seitz discusses exclusive dealing arrangements and Vernon Mund, refusals to sell.

Jesse Markham comes up with a piece on concentration, Harry Kemper on trade associations and Rudolf Callman on trademarks. Homer Clark tells about selling below cost and James A. MacLachlan about our old friend, Fair Trade.

Dean Thomas W. Christopher of the Lamar School of Law of Emory University in Atlanta, Georgia, writes on federal controls of foods and drugs. In this Professor Carl Fulda of Ohio State Law School joins him with a piece on the Agricultural Exemption in the Motor Carrier Act that provokes endless I.C.C. litigation (see *Frozen Food Express* v. *U.S.*, 148 F. Supp. 399, and the controversy between Carl Helmeteig, Jr., Assistant General Counsel of the Pennsylvania Railroad, 43 *Virginia Law Review* 211, and Professor Fulda who answered in 43 *Virginia* 677).

Josiah Baker, law clerk to a leading

Tennessee chancellor, tells about trading stamps. Edward Snell studies *International News* v. *Associated Press* and considers its impact on subsequent cases. Leonard Elman gives us the latest on clothing designs. Arthur Miller writes on federal contractors and the two-issue symposium closes with an article by Lee Loewinger on the role of the lawyer as a solicitor rather than as a barrister.

There are so many and such good articles in these two issues, the poor antitruster could use just one article on how to obtain eyes and time to read them all.

This is a real difficulty when you read as many law reviews as I do. But make no mistake you never miss the good ones. And the piece on the *du Pont-General Motors* case that tops them all is the one Professor John Stedman of Wisconsin Law School did in the November-December, 1957, *Northwestern Law Review* (Volume 52, pages 567-617, No. 5; address: 357 East Chicago Avenue, Chicago 11, Illinois; price: $1.50). Its title is: "The Merger Statute: Sleeping Giant or Sleeping Beauty", and the article is as good as the title. It is a whopper in length—fifty pages but I read every line on every page with avidity. What a grasp of both economics and law that Stedman has! He twists those economists that are beyond my comprehension around his fingers.

Stedman lays out the differences between the two bees (Brennan and Burton) in 1, 2, 3, 4 fashion: First, does Clayton 7 apply to vertical acquisitions? Second, are automobile finishes and fabrics the "relevant market" or "line of commerce" within the meaning of Clayton 7? Third, is it sufficient that there is a restraint of trade "at the time of suit" rather than at acquisition? Fourth, within this framework does the evidence compel the conclusion that a restraint existed?

Interestingly enough, Stedman feels on Point One that Brennan is right but that on Point Two he is on tenuous ground in view of the fact that the *du Pont Cellophane* case at the October, 1955, Term defines the market differently and is clearly contrary. Moreover, Stedman contends that in Point Two Brennan relies on the quantitative substantiality test of *Standard Stations*, 337 U.S. 293. But just as he warms to the topic, Stedman lets the discussion fall like a lead balloon (page 575) because, as his title indicates, he is more interested in Point Three.

Point Three Stedman subdivides as follows: First, is Brennan's interpretation of Clayton 7 (that it applies "at time of suit" rather than acquisition) "defensible in terms of the language of section 7 and its legislative and subsequent history?" Second, what are its probable effects on present and future mergers? And, third, are these effects "good or bad in terms of the public interest in a strong antitrust policy?"

Stedman's answer to subdivision one is that,

> the decision reached by Justice Brennan seems to find adequate support in the wording of the statute, in the legislative history, in the accepted principles of statutory interpretation, and in the light of such precedents as exist [page 584].

In answering subdivision two, Stedman emphasizes the likelihood of an owner-corporation influencing the owned-corporation, even in the face of the latter's resistance. To illustrate, he discusses du Pont's influencing General Motors to leave chemicals to it, even when they were discoveries as valuable as tetraethyl lead, freon and synthetic rubber, quoting Lord Byron's Julia:

> A little she strove and much repented
> And whispering
> "I will n'er consent"
> ————consented. . . .

to drive home his point. With this and other factors in mind, he concludes that whether the merger be horizontal, vertical or conglomerate, "it would now seem to require considerable courage to assure the concerns involved that they will not sooner or later, be found to have violated section 7." And he cites the decision of Dawson, D. J., in the Southern District of New York in *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387, decided three days after the *du Pont-General Motors* case to show that "even the fact that the merger enables the affected concerns to compete more effectively against larger competitors may prove unavailing, depending upon the circumstances" (page 591). From all of which I conclude that unlike most commentators, Stedman believes that the effects of the decision on future mergers will be far-reaching, assuming the Court maintains its advanced position and the antitrust agencies maintain their vigor.

Stedman answers subdivision three by saying that the decision of Mr. Justice Brennan is salutary in that "it puts a damper upon the present merger activity" and "brakes the drive toward ever-increasing size and concentration" (page 616). He examines the cause and effects of mergers and suggests that their disadvantages may considerably outweigh their advantages. In this discussion he draws heavily on the testimony of economists before the Senate Antitrust Subcommittee. Particularly enlightening is his discussion and translation of the most significant study of Jesse Friedman, entitled "Corporate Mergers and Acquisitions", Senate Report No. 132, 85th Congress, First Session, 1957. In the study of mergers this Friedman report is a must but unless you are a top-notch economist you will, as a lawyer, appreciate more the significance of Friedman's conclusions if you read Stedman on it. In view of the doubtful affirmative value, the likelihood of public damage and the difficulties in evaluating present facts and future effects of mergers, Stedman suggests that they, along with other Clayton Act practices, may constitute a "second-level" category of business practices, which may properly be barred on relatively slight evidence of probable injury to competition, even though not considered illegal *per se*.

Concluding, Stedman comments that the decision is in the public interest in that,

> It gives judicial recognition to the fact that an arrangement whereby the largest chemical concern in the country gets the inside track with the largest automobile manufacturer (and a corporation) to the tune of $23 million a year and potentially twice that amount may be good for General Motors but is not good for the United States and certainly not good for our competitive, free enterprise system. But until we

know more of the things we need to know, we can only guess whether we are, indeed, faced with a "sleeping giant", as Justice Burton would have it, now aroused and threatening to scourge the economic countryside, or with a "sleeping beauty" upon whom the reluctant Prince Charmings of the Antitrust Division have, at the insistence of Justice Brennan, bestowed the kiss that has brought her belatedly to life . . . [pages 616-617].

There is a timely article with respect to leverage in tie-in cases in the November, 1957, *Yale Law Journal* (Vol. 67, No. 1, pages 19-36; address: 401 A Yale Station, New Haven, Conn.; price: two dollars). It is called "Tying Arrangements and the Leverage Problem" and is written by Professor Ward S. Bowman, Jr., who teaches law and economics at Yale Law School. He states: "Present legal methods of treating tying contracts are based upon a false notion of leverage." This interests me but I must confess I do not comprehend the Professor's argument. If right, he has something. The "power or leverage" of a tie-in caused the Supreme Court to grant summary judgment in *Northern Pacific* v. *U. S.*, Docket 59, March 10, 1958, 26 U.S. Law Week 4173. Clark, J., did not sit and Justices Harlan, Frankfurter and Whittaker dissented. In his opinion for the Court, Mr. Justice Black follows *International Salt*, 332 U.S. 392, rejects *Times-Picayune*, 345 U.S. 594, and regards a "tie-in" as much a *per se* offense under Sherman 1 as price fixing (*Socony-Vacuum*, 310 U.S. 150), division of markets (*Addyston Pipe*, 85 F. 271, *affirmed* 175 U.S. 211) and group boycotts (*Fashion Originators*, 312 U.S. 457). The dissent of Harlan, J., asked for trial to determine the dominance of Northern Pacific and the effect of its "tie-ins" on the relevant land market. Under the *Standard Oil* case of 1911 (221 U.S. 1) Mr. Justice Harlan called for proof that the "tie in" was an unreasonable restraint and pointed out that a case under Clayton 3 was different. Neither Professor Bowman nor my good friend Professor Handler will care for this decision.

BAR ACTIVITIES

. . . and the Court was about to add, José María Martín, "May God have mercy on your soul," but the Court will not assume the responsibility of asking an Allwise Providence to do that which a jury of your peers has refused to do. The Lord will not have mercy on your soul!

These few words of the death sentence of José María Martín infamous murderer that he was permit a brief insight into the personality of one of the most picturesque figures in New Mexico's judicial history and suggest the almost incredible and even legendary events that fostered the present New Mexico Bar and ultimately led to construction of the Supreme Court Building and State Bar headquarters. The entire death sentence of José María Martín, pronounced in Taos about 1861, is given in the following paragraphs.

In design, construction and care the New Mexico Supreme Court Building is truly a thing of beauty and it is impossible to describe or discuss the building divorced from the centuries of history enacted on the very site it occupies, one of the oldest cities in the United States. It is quartered on ground over which have rolled countless freighting wagons of the Santa Fe Trail as they entered the village of sun, sand and adobe; and over it have trod the unshod mounts of the Conquistadores; of hordes of rebellious Indians; of Kit Carson and his mountain men; and each may have quenched his thirst in the mountain stream that flows within the shadows of the building. The claim for antiquity of Santa Fe is based upon the premise that when the Spaniards first entered the region about 1542, they found a large Pueblo town on the present site and that its prior existence



New Mexico Supreme Court Building

extended far back into vanished centuries. Eventual construction of the Supreme Court Building and New Mexico Bar headquarters was no mere happenstance, but the circumstances that led to it are interwoven with the evolution of the legal profession and the activities of personalities who contributed to its growth and progress.

From the very beginning of American occupation of the New Mexico Territory the struggle to create and maintain a workable court system was hampered by an almost total lack of understanding of democratic procedure by the rank and file of citizenry of the new country. The first court system suffered severe growing pains punctuated with bloodshed and pathos and yet with incidents of a lighter vein when viewed in retrospect from the safe distance of the atomic era.

Within days following the bloodless conquest of the territory by the Army of the West in 1846, General Stephen Watts Kearny established a three-judge superior court to be the highest tribunal of the new Military Department, with each judge to serve also as the trial judge of a designated judicial district. At specified intervals the three judges sat in concert as a court of review. Thus it was that for several months each year a judge tried cases in his respective district and thereafter participated in a determination of the correctness of his decisions. Undoubtedly this system led to unfavorable comment among early day litigants.

General Kearny appointed one Joab Houghton, formerly United States consul in Santa Fe, as the first presiding judge of the departmental court. The appointee Houghton was not a lawyer, but was a merchant and an engineer of sorts. During his tenure as a judge of the New Mexico courts Houghton felt that he had become proficient in the law and he later entered private practice. W. W. H. Davis, an early day United States Attorney, described a Taos court scene during Houghton's encumbancy as, "a low rude mud building, and less comfortable than the cow stables in some of the states. ... There were neither boards nor carpet to hide the earthen floor, which was damp and cold. ... The little place held all that was mortal and immortal of his honor, much resembled a sentry box, but was inferior in point of equipments. A small pine table in front was used by the clerk, marshal and lawyers. ... There was a man [the defendant] to whom all eyes were turned, fastened up in a cage."

In 1853 President Fillmore appointed Grafton Baker, of Mississippi, as the first regular Chief Justice of the Supreme Court of the New Mexico Territory. Chief Justice Baker was learned in the law, but soon after taking over the duties of his office he demonstrated an amazing lack of diplomacy in dealing with his associates and experienced difficulty in maintaining the dignity of his office in matters of personal decorum. One incident of indiscreet conduct on his part resulted in a serious breach in relations between the early judiciary and papal dignitaries, particularly Bishop John B. Lamy.

At the beginning of the Baker regime, the Santa Fe court was being held in a military chapel of the Catholic Church. On one occasion Judge Baker was engaged in the interesting project of presiding over a session of his court in the chapel while simultaneously consuming a goodly quantity of the frontier's most spirituous liquors. For reasons unimportant to relate Judge Baker became highly incensed at Father Joseph P. Machebeuf, a staunch friend and adviser of Bishop Lamy. While in his cups, Judge Baker announced that he proposed to have Padre Machebeuf hung from a chapel rafter, and, furthermore, that if the proposal did not meet with the wholehearted approval of Bishop Lamy he would likewise hang the good Bishop from the same gibbet, but higher and longer. Bishop Lamy, understandably, was not favorably impressed with the Baker announcement and the prelate responded by return courier with a direction to Judge Baker, in substance, that the Judge could gather up his court and get out of there and never, never again let his insidious shadow darken the doors of the chapel. At that stage of events the Santa Fe populace—entirely in sympathy with Bishop Lamy—decided that the judicial folly should forthwith cease and a large and hostile group gathered before the Baker residence. The muttering of the crowd added up to the simple admonition, "Hang the bum!" After Baker was unable to get military protection Father Machebeuf interceded before the angry crowd and gave his honor an opportunity to scamper across the plaza and personally deliver his apology to Bishop Lamy.

Thereupon, a crude and small adobe building was acquired for use of the court. In his *El Gringo,* Davis makes reference to a criminal trial conducted in 1852 by Chief Justice Baker:

> Four Indians were indicted for the murder of two of their own number. It was proved, on the trial, that the two murdered men had been accused of the imaginary offense of witchcraft, which consisted in eating up the little children of the village, and their accusers alleged that they saw them pulling the bones of their victims from their mouths and nostrils. The village assembled in council ... to adjudge the case and award the punishment. They condemned the accused to death. They were made to kneel down, side by side, and were both killed by the same fire. Four only were indicted. ... The defendants were acquitted because the venue was not clearly proved, as the killing took place upon or near the line between two counties, and it could not be shown upon which side of the line it occurred.

The growth of the judicial system of New Mexico was extremely slow. This retarded development may well be understood when it is considered that the Territory was a geographical giant, some 600 by 400 miles in area; that prior to 1887 it was divided into only three huge judicial districts which required attorneys, judges and court personnel to travel great distances by stage and horseback, ordinarily without armed escort and through territory overrun by marauding bands of renegade Indians, to attend sessions of court; and that the judges—for an annual stipend of $2,500—were strictly political appointees who enjoyed no stability of tenure in office. The raw New Mexico frontier offered little to attract polished legal talent from the "States". It speaks well to the credit of the few pioneer lawyers and judges that they were sufficiently dedicated to

the cause of equal administration of justice under law that they could endure the privations and dangers of their lot; and that they were able to maintain a judicial system, crude as it then was.

Kirby Benedict was originally appointed as an associate justice to the New Mexico court by President Pierce and he was later appointed chief justice by President Lincoln. Justice Benedict was without doubt the most bizarre and flamboyant figure to occupy a position on the Territorial court. He possessed all of the fire and brimstone of Grafton Baker of the Bishop Lamy episode, as well as an aversion to the flow of red wine. In addition, Benedict was of recognized legal ability and he possessed an uncanny skill in dispensing ridicule and satire. It was Benedict who, it is said, pronounced the sentence of death upon a Taos murderer, José María Martín, who had been convicted of a particularly vicious and unwarranted killing. The sentence follows.

> José María Martín, stand up! José María Martín, you have been indicted, tried and convicted by a jury of your countrymen of the crime of murder, and the court is now about to pass upon you the dread sentence of the law. As a usual thing, José María Martín, it is a painful duty for the judge of a court of justice to pronounce upon a human being the sentence of death. There is something horrible about it, and the mind of the court naturally revolts from the performance of such a duty. Happily, however, your case is relieved of all such unpleasant features and the Court takes positive delight in sentencing you to death!
>
> You are a young man, José María Martín—apparently of good physical condition and robust health. Ordinarily you might have looked forward to many years of life, and the Court has no doubt you have, and have expected to die at a ripe old age; but you are about to be cut off in consequence of your own act. José María Martín, it is now springtime. In a little while the grass will be springing up green in these beautiful valleys, and on these broad mesas and mountainsides flowers will be blooming; birds will be singing their sweet carols, and nature will be putting on her most gorgeous and her most attractive robes, and life will be pleasant and men will want to stay, but none of this for you, José María Martín. The flowers will not bloom for you, José María Martín; the birds will not carol for you, José María Martín; when these things come to gladden the senses of men, you will be occupying a space about six by two beneath the sod, and the green grass and those beautiful flowers will be growing above your lowly head.
>
> The sentence of the Court is that you be taken from this place to the county jail; that you be kept there safely and securely confined, in the custody of the sheriff until the day appointed for your execution. (Be very careful, Mr. Sheriff, that he have no opportunity to escape and that you have him at the appointed place at the appointed time.) That you be so kept, José María Martín, until—(Mr. Clerk, on what day of the month does Friday, about two weeks from this time come? March twenty-second, Your Honor.) Very well,—until Friday, the twenty-second of March, when you will be taken by the sheriff from your place of confinement to some safe and convenient spot within the county (that is in your discretion, Mr. Sheriff, you are only confined to the limits of this county), and that you be there hanged by the neck until you are dead, and the Court was about to add, José María Martín, "May God have mercy on your soul", but the Court will not assume the responsibility of asking an Allwise Providence to do that which a jury of your peers has refused to do. The Lord will not have mercy on your soul!
>
> However, if you affect any religious belief, or are connected with any religious organization, it might be well for you to send for your priest or your minister and get from him such consolation as you can; but the Court advises you to place no reliance upon anything of that kind!
>
> Mr. Sheriff, remove the prisoner.

It is said that Martín escaped the Taos jail and was never recaptured.

It was not until many years following the close of the Civil War that funds were provided for construction of a building to be used exclusively as the Territorial capitol. And so, it was, at long last that a permanent home for the court was provided in the first capitol, inadequate as it was even at that early date. But, the improvement was short-lived. In 1892 the new capitol building was destroyed by fire. It was believed in many quarters that the fire was of incendiary origin and rumors of arson were rampant, but it is not known that proof was ever produced tending to identify a wrong-doer if, in truth, there was arson. Certainly, many documents and records of historical value were destroyed. The charred and stained condition of early day records in the office of the Clerk of the Supreme Court today are mute evidence of the damage resulting from the fire.



Lowell C. Green

A special session of the New Mexico Legislature was convened in 1934 to consider proposed legislation designed to relieve economic stress of the state following the depression years the entire country had experienced. Early in the session a bill was enacted which authorized construction of a public building in Santa Fe to be known as the Supreme Court Building. This building program was to be undertaken as a Public Works Administration project with the Federal Government sharing generously in the over-all cost. The law further authorized issuance of bonds to the amount of $175,000 to finance the state's portion of the cost of the building. To retire these bonds a new tax was instituted which assessed $2.50 on each civil case docketed in the district courts of the state. This method of taxation placed the burden of financing the building upon the shoulders of the citizens who made use of the courts—the litigants—and it was so successful in providing revenue that the last bonds were retired many years before their maturity date. The building was completed and occupied by the court and Bar during the month of August, 1937.

The integrated State Bar of New Mexico has a total membership of 850, with approximately 725 attorneys actually residing and practicing within the state. Obviously, this small organization has no need for, and cannot financially afford, independent quarters. The Clerk of the Supreme Court likewise serves as Secretary of the New

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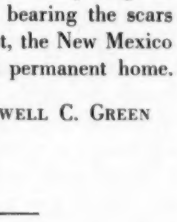
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Mexico Bar. For economic reasons, the affairs of eight agencies—all of the judicial department of the state—are administered through the Clerk's office. Private rooms in the Supreme Court Building are provided for meetings of the Bar Commission and for use of various bar committees. Also, a room was designed for use as an examination room and it is utilized exclusively by the Board of Bar Examiners.

Thus it is that after the passage of a century, of years bearing the scars of a struggle to exist, the New Mexico Bar has acquired a permanent home.

LOWELL C. GREEN

Secretary, State Bar
of New Mexico



John A. Fogleman

Almost one half of the 1030 members of the Arkansas Bar Association met at Hot Springs on May 8 and 9 for the Association's 60th Annual Meeting with President Edward L. Wright, of Little Rock, presiding. The organizational meeting of the Conference of Local Bar Associations was held in conjunction with the Annual Meeting of the Association, as well as meetings of the Executive Council of the Arkansas Judicial Council and of the Arkansas Municipal Judges Association. Oscar Fendler, of Blytheville, was elected President of the Conference of Local Bar Associations.

The newly elected Association officers are John A. Fogleman, of West Memphis, President; Willis B. Smith, of Texarkana, Vice President; and H. Maurice Mitchell, of Little Rock, Secretary-Treasurer. Herschel H. Friday, Jr., of Little Rock, was re-elected to represent the Arkansas Bar Association in the House of Delegates of the American Bar Association.

In his address before the Assembly, President Wright reviewed the history of the Association and stressed the need for a permanent Headquarters for the Association. He said, "The need for physical expansion of our quarters is obvious to any one who has analyzed our activities and the certain growth in the years ahead. We do not need and I do not know of any member who advocates the construction of a monumental type of building. Rather, we critically require a functional, dignified structure conveniently located in our capital city so that it can house the personnel and the materials of our vitally expanding group."

The Association voted the continuation of the Committee for Planning and Constructing a Permanent Bar Headquarters Building. Other action was the authorization of the formation of an Arkansas Bar Association Title Insurance Company, and the adoption of the report of the Election Code Committee with recommendations for legislative enactments concerning election laws.

Among the speakers were Charles S. Rhyne, President of the American Bar Association; Judge Harold R. Medina, of New York City; and Harry E. Meek, of Little Rock.



Timothy W. Swain

The 82d Annual Meeting of the Illinois State Bar Association was held in Aurora on May 7-9. Attendance at the meeting, 850 lawyers and ladies, was a tribute to the excellent cooperation and entertainment program of the Kane County Bar Association, meeting host. President Barnabas F. Sears, of Chicago, President, presided.

Officers and members of the Board of Governors for the fiscal year beginning July 1 are: *President*, Timothy W. Swain, of Peoria; *First Vice President*, David J. A. Hayes, of Chicago; *Second Vice President*, Gerald C. Snyder, of Waukegan; *Third Vice President*, Owen Rall, of Chicago; and *Secretary*, Edward B. Love, of Monmouth. The Treasurer will be named later by the Board of Governors. New members on the Board of Governors include: Samuel H. Young, of Chicago, and C. Terry Lindner, of Springfield, former Treasurer of the Association. Other members of the Board of Governors include: Stanford S. Meyer, of East St. Louis; William B. Wham, of Centralia; Frederick H. Lauder, of Monmouth; Harry B. Hoffman, of Peoria; Mason Bull, of Morrison; James W. Barr, of Joliet; Erwin W. Roemer, Daniel M. Schuyler, Horace A. Young and Nat M. Kahn, all of Chicago, and David F. Root, of Morris.

A highlight of the meeting was an address by Governor Frank G. Clement of Tennessee, who spoke at the Annual

Dinner. To accommodate the capacity crowd of 500 lawyers and ladies, the local bar association arranged for the dinner to be held in the Aurora National Guard Armory. Governor Clement praised the association's "down-to-earth" program, its publications and legal clinics, and discussed the Tennessee system of general session courts which are replacing, by local referendum, the justice of the peace courts in that state. The Illinois State Bar Association is urging the adoption, at a referendum in November, of a judicial amendment to the state's Constitution that would, among other things, eliminate the justice of the peace and police magistrate courts.

Section programs included: "The Art of Advocacy" and "Two Years, Four Months and Seven Days of the Civil Practice Act", sponsored jointly by the Sections on Civil Practice and Procedure and the Junior Bar Section; "Income Tax Aspects of Real Estate Title Holdings" and "A Proposed Merchantability Statute", sponsored by the Real Estate Section; "Is Your Client an Inventor?", sponsored by the Patent, Trade-Mark and Copyright Law Section; and "Common Errors in the Courts", sponsored by the Sections on Negligence and Insurance Law.

A Conference of Local Bar Officers heard a discussion of the "Economic Problems of Law Practice" arranged by the Committee on Professional Services. Luther Bang, of Austin, Minnesota, gave an illustrated lecture on "The Present Dilemma of the Legal Profession", following which John C. Satterfield, of Jackson, Mississippi, Chairman of the American Bar Association's Special Committee on Economics of Law Practice, spoke on "The Role of State and Local Bar Associations in Improving the Economic Status of Lawyers". Members of the conference then heard a panel discussion on "The Judicial Amendment—The Bar's Responsibility" sponsored by the Special Committee To Promote the Judicial Amendment. Timothy W. Swain, of Peoria, Chairman of the committee and President-Elect of the Association, moderated the panel consisting of Mason Bull, of Morrison, President Barnabas F. Sears, of Chicago, and Gerald C. Snyder, of Waukegan.

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The Judicial Amendment, passed by the Illinois Legislature in 1957, calls for an integrated trial court instead of the present system of multiple courts of overlapping jurisdiction; the elimination of justice of the peace and magistrate courts; elimination of all fee offices in the judicial system; administrative control of circuit courts by the Supreme Court; and other widely acclaimed reforms. Modelled after the New Jersey system, the Illinois judicial article would, if approved by the people on referendum in November, give Illinois one of the most modern court structures in the nation.

A motion was passed by the local bar officers in attendance requesting the state association's Board of Governors to formally create a Conference of Local Bar Officers to meet regularly at the time and place of the annual and midyear meetings of the state association. The conference at present has no official status.

At a meeting of the Board of Governors, a report of the Special Committee on Judicial Advisory Polls was approved creating a standing committee whose duty it will be to supervise and conduct judicial advisory polls upon the request of local bar associations in accordance with procedure established by the Board of Governors, and to study, formulate and recommend methods for the conduct of polls. The governing board also approved a resolution opposing the Jenner Bill, S. 2646, which would limit the appellate jurisdiction of the Supreme Court of the United States. The Board of Governors changed the name of the Section on Matrimonial Law to the Section on Family Law and increased the scope of the 1400-member section to include all matters pertaining to adoption, separate maintenance, annulment, divorce, etc. The section is working on the codification of all Illinois family law. The Board also authorized its Section on Commercial and Bankruptcy Law to participate in a joint study, with a similar committee of the Chicago Bar Association, of the Uniform Commercial Code to determine whether the Code should be submitted to the Illinois Legislature at its next session.

Each year the Association honors its members who have completed 50 years at the bar of Illinois by conferring upon them the title of Senior Counsellor. Forty-one members of the "Class of 1908" were recognized in an impressive ceremony during the Annual Dinner. Clarence W. Diver, of Waukegan, a past president of the Association, responded on behalf of the senior counsellors following the presentation of certificates.

The Annual Meeting in 1959 will be held in Peoria and in 1960 in Chicago.

The Ohio State Bar Association held its 78th Annual Meeting in Akron on May 22-24. President Aronhold C. Schapiro, of Portsmouth, presided at the sessions, which were attended by over 950 members and some 300 wives.

William R. Van Aken, of Cleveland, was elected President, to take office July 1, and Allan B. Diefenbach, of Akron, will succeed him as Vice President.

Warren H. Resh, Editor of the American Bar Association's *Unauthorized Practice News*, spoke during the Local Bar Activities dinner on the topic of "Safeguarding the Administration of Justice from Illegal Practice".

Charles S. Rhyne, President of the American Bar Association, delivered

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William R. Van Aken

an address at the annual banquet entitled "Law for Weapons in Resolving Disputes Between Nations".

A trial practice institute, which featured a mock trial with James F. Bell, Judge of the Supreme Court of Ohio, presiding, was the first of eight institutes conducted during the meeting. Other institutes concerned investments, finances and banking; probate practice and estate planning; taxation; corporation law; labor law; municipal law; and workmen's compensation.

Six members of the association were honored at the annual banquet for over sixty-five years' service to the profession, and seventeen members, who have had fifty years of service, were also honored.

Chief Justice of the Ohio Supreme Court, Carl V. Weygandt, presented the association's Fourth Annual Journalism Awards to four Ohio newsmen, an Ohio newspaper and an Ohio radio station for "their constructive contributions to the administration of justice and the science of jurisprudence".

At the Council of Delegates meeting, endorsement was given to a program for presenting to the voters of Ohio a proposed constitutional amendment providing for the selection and tenure of judges similar to the one in effect in Missouri.

Announcement was also made of approval of a plan for the erection of a new headquarters and research building near the Ohio State University campus. The building will be made possible through the co-operation of the Board of Trustees of The Ohio State University and the Ohio State Bar Association Foundation.

The Rev. Laurence H. Hall, of Cleveland, addressed the concluding luncheon on the inspirational-humorous topic "Are Lawyers Human?"

Seven allied groups, including all of the judges' associations of Ohio, the prosecuting attorneys' association and The League of Ohio Law Schools, held concurrent meetings.



Jay W. Scovel

Sellers Studio

The 1958 annual meeting of the Bar Association of the State of Kansas was held in Topeka, May 7 to 10. Over 675 of the Association's 1800 members registered and attended the business, educational and social sessions. Special activities were planned for the wives. President O. B. Eidson, of Topeka, presided. William A. Gray, of Topeka, was chairman of the meeting.

Officers elected to serve until the 1959 meeting to be held in Hutchinson, May 6 to 9, were President, Jay W. Scovel, of Independence; President-Elect, William M. Beall, of Clay Center; Vice President, D. B. Lang, of Scott City; and George B. Powers, of Wichita, was re-elected Secretary-Treasurer. Maurice A. Wildgen, of Larned, was elected to the Executive Council. John W. Shuart is Executive Secretary of the Association.

This year the Local Bar Awards were made to the Wichita Bar Association and the Reno County (Hutchinson) Bar Association. The award is based upon initiative, service and accomplishments in the fields of law, public relations and administration of justice.

Associated organizations meeting in Topeka at the same time as the bar meeting included the City Attorneys' Association of Kansas; Kansas District Judges' Association; Kansas County Attorneys' Association; Kansas Shorthand Reporters' Association and the Kansas Probate Judges' Association.

President Charles S. Rhyne of the American Bar Association addressed the general assembly. His talk was entitled "Law for Weapons in Resolving Disputes Between Nations". Another important speaker was retired Justice Hugo T. Wedell, of the Kansas Supreme Court, who spoke on the subject of the "Non-Political Selection of Justices". A constitutional amendment will be voted upon this November in Kansas which will provide for a method of selection of justices in Kansas which is based in part upon the "Missouri Plan" and the "American Bar Association Plan" of selection.

At this year's meeting there was emphasis upon continuing education and a moot court was held on the subject of "Cerebral Stroke". The participants were Judge Spencer A. Gard, of Iola, Harry A. Gair and Emile Z. Berman, of New York City, and Dr. D. B. Foster and Dr. J. A. Segerson, of the Menninger Foundation of Topeka. Members were most enthusiastic about this meeting and the entire proceeding will be printed in the *Kansas Bar Journal*.

Speakers at the other meetings included Norman Jeter, of Hays, who spoke on "Natural Gas"; Tom Schwinn, of Wellington, on "Probate Law"; Robert Partridge, of Wichita, on "Principal's Liability Under G. S. 44-503"; and E. P. Villepigue, of

Wichita, who discussed "Recent Trends Defining an Accident and Determining Disability".

Other talks given included "The National Labor Relations Board: Its Jurisdiction and Procedures" by Thomas C. Hendrix, of Kansas City, Missouri, Chief Law Officer, 17th Region, N.L.R.B.; "The Kansas Labor Statute and State Labor Procedures" by Edward H. Sondker, of Topeka, and "The Problem of Federal Pre-Exemption and the Twilight Zone in Labor Disputes" by Stephen W. Reynolds, of Kansas City, Missouri, formerly Assistant General Counsel, N.L.R.B.

As an innovation this year a cabaret dance was held and entertainment was provided by members of the Topeka Bar Association, presenting an hour long skit instead of their usual 3-hour show. The title of the musical show was "In Pari Delicto" and was "dedicated to our great democratic system as practiced in the sunflower state".

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The principal address at the annual banquet was given by Dr. Kenneth McFarland, of Topeka, Education Consultant for General Motors Corporation.

Attorneys awarded "50-Year Certificates" this year included B. F. Alford, Wichita; Roy A. Cox, Augusta; R. E. Coughlin, Paola; Eugene W. Grant, El Dorado; Adam B. Keller, Pittsburg; Alf M. Landon, Topeka; Clifton A. Spencer, Oakley; M. V. B. Van De Mark, Concordia; Frank L. Bates, Kansas City; Harry A. Gaskill, Liberal; Frank J. Horton, Goodland; John H. Connaughton, Protection; Edward H. Coughlin, Paola; Robert E. Coughlin, Paola; Clarence G. Dennis, Sublette; A. R. Lamb, Coffeyville; Otto R. Souders, Wichita; Ray H. Tinder, Wichita; J. W. Baird, Kansas City; Raymond F. Rice, Lawrence; L. M. Resler, Pittsburg; Samuel E. Bartlett, Wichita.

New committees organized at the annual meeting were a Military Law Committee and a standing committee provided for by the adoption of a joint Medical-Legal Interprofessional Code—adopted earlier in the week by the Kansas Medical Society.

Professional Income

(Continued from page 618)

people of a very mean or low condition. Their reward must be such, therefore, as may give them that rank in the society which so important a trust requires. The long time and great expense which must be laid out in their education, when combined with this circumstance, necessarily enhances still further the price of their labour.

* * *

The wages of labour in different employments vary according to the probability or improbability of success in them. The probability that any particular person shall ever be qualified for the employment to which he is educated, is very different in different occupations. In the greater part of mechanic trades, success is almost certain; but very uncertain in the liberal professions. Put your son apprentice to a shoemaker, there is little doubt of his learning to make a pair of shoes: But send him to study the law, it is at least twenty to one if he ever makes such proficiency as will enable him to live by the business. In a perfectly fair lottery, those who draw the prizes ought to gain all that is lost by those who draw the blanks. In a profession where twenty fail for one that succeeds, that one ought to gain all that should have been gained by the unsuccessful twenty. The counseller at law who, perhaps at near forty years of age, begins to make something by his profession, ought to receive the retribution, not only of his own so tedious and expensive education, but of that of more than twenty others who are never likely to make anything by it. How extravagant soever the fees of counsellors at law may sometimes appear, their real retribution is never equal to this.... The lottery of the law, therefore, is very far from being a perfectly fair lottery; and that, as well as many other liberal and honourable professions, is, in point of pecuniary gain, evidently under-recompensed.[12]

Although the economic theories of Adam Smith have, in some respects, been modified or superseded in contemporary economic thinking, the relationships suggested in this passage are basically as valid today as they were 180 years ago. In an occupation open to all—such as common, unskilled labor—the wages will be relatively low as the supply will be large. In jobs requiring more skill, fewer individuals will qualify, with the number diminishing as the degree of skill required increases. As fewer are qualified so the supply is diminished and the price—wages—paid for the job increases. Probably there will not be as simple a mathematical relationship between the factors involved as the early economists thought. But, in the long run, the basic relationships will hold, even though there be other factors, such as exclusionary laws and labor organizations, that weigh the balance more heavily in one direction or the other.

When we come to consider professions such as medicine and law a new element enters. There is no *economic* principle that prevents any charlatan or swindler from practicing law or medicine. Society, recognizing the importance of the interests dealt in by these occupational groups, sets certain standards of minimum qualification for those who shall be permitted to go to the public for the purpose of dealing with such interests. The level at which these standards are set determines the relative numbers who may be able to qualify for such occupations—and thus, indirectly, the economic level of the occupations.

Raising the standards of qualification for entrance into the legal profession (or any other, for that matter) will not

12. Adam Smith, THE WEALTH OF NATIONS (1776) Modern Library edition, pages 105-106.

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and should not be simply for the purpose of raising the economic level of remuneration. It will, immediately, exclude a number of the lesser qualified from the profession, and thus tend to raise the general level of professional competence and service to the public. It will also have longer range and more indirect effects. As the standards and economic levels are raised the more able young persons who are trying to decide upon an occupation will tend to be attracted to the profession.

Undoubtedly there will be many lawyers who say that economic motivation should be secondary, or even unimportant, in the choice among professions. It is easy for those who are already established to say this. (Few among the economic lower third will be heard to this effect.) However, it is elementary among psychologists and vocational counsellors that the higher you go in the scale of ability the wider is the range of individual talents and interests. Those who would make the best lawyers are, by and large, the same youths who would also make the best doctors and engineers and scientists, and so forth. It is easy to forget, but at the age when one is choosing a profession interests are seldom narrow or fixed and slight influences can sway the formative purpose. What then should a bright youth think when he reads in a recent popular *Guide to Earning a Living*, under the heading of "Lawyer", the following:

> Swollen enrollments pose serious problems of over-crowding in a field already lacking in elbow room. Probably only the best-qualified newcomers will have an even chance of success; glutted market likely to force down income average—particularly for young lawyers.[13]

Inevitably the economic status of the profession will have a great influence on the caliber of those who are attracted into it, and thus who will be the practitioners of the next year and decade.

The economic status of the profession will have other effects. One of the great debates now going on in the profession is over the issue of specialization. This, of course, is a stereotype word that may mean much or little. To those who are opposed it means a narrowing of outlook and interest which reduces the lawyer's ability to serve as a general counsellor. To many who argue in its favor, it means an increase in the expertise of all who are willing to take the trouble to become specialists. Probably there is something in the arguments of both sides. Certainly specialization is not the equivalent of expertise. Many lawyers have learned to their sorrow in practice before administrative agencies that a specialist is not necessarily an expert.

Experts and Specialists . . . An Aspect of the Problem

On the other hand, it is practically impossible to be an expert today without being a specialist. At one time every lawyer was an expert in the field of law. But as the field of law comes to include vast new areas and as the rules and precedents increase in both complexity and number, in geometrical progression, it is quite literally becoming impossible for any single lawyer to be competent, much less expert, in all the areas of law. Still most lawyers profess to be general practitioners and are quite reluctant either to narrow their own field of practice or to refer their clients to specialized experts when unfamiliar problems arise. The result is that the profession is losing much of what it considers "legal business" to a host of new competitors —who are specialized, and, often, expert. For example, much tax work is going to accountants; pension and estate planning is being done by insurance agents and bank officials; transportation problems are being handled by rate bureaus and agents; labor disputes, and even many commercial disputes, are being handled by arbitrators.

It seems probable that much of the opposition both to specialization and to reference and consultation among lawyers arises from economic motivation—the simple fear of losing clients. Among doctors, who do not share this fear to anything like the same degree, reference and consultation is much more common. It is noteworthy, too, that many—though certainly not all—of the best lawyers practice in firms in which at least some degree of specialization and reference and consultation among lawyers are freely practiced.

At this point we should recall the fact noted above, that one of the few correlations found in the economic study of the legal profession is between size of firm and income. It can hardly be an accident that the larger firms tend to have the more specialized lawyers, tend to have the best lawyers, and also have the largest incomes. This correlation becomes even more striking when we find its parallel in the medical profession. During the period when the income of physicians was rising from below that of lawyers to substantially above, the proportion of full specialists in the medical profession increased by 76 per cent. In 1929, among all physicians the number of full specialists was 26 per cent; twenty years later this number had increased to 46 per cent of the medical profession.[14] This is undoubtedly related to the change in relative economic status. In 1955 the median net income of general practitioners in the medical field was $14,800, while that of medical specialists was $18,000.[15] The same relationship has existed in prior years, and also holds true in the field of

13. Cunningham and Reed, GUIDE TO EARNING A LIVING (Simon & Schuster 1955) pages 17-18.

14. *Income of Physicians*, U. S. Department of Commerce, SURVEY OF CURRENT BUSINESS, July, 1951.

15. *How Much Are Physicians Earning?* 33 MEDICAL ECONOMICS 110 *et seq.* (October, 1956).



dentistry.[16] Parenthetically it might also be noted that, in medicine at least, specialists tend to find the practice of their profession more satisfying than do general practitioners.[17]

It is fair to conclude that there is a circular, or reinforcing relationship between economic status, specialization and expertise. As standards are raised, the marginally competent are excluded, the supply of services is somewhat diminished and the remuneration to those in the profession is increased. This tends to attract the more able young people to the profession. It also provides greater economic security for those within the profession, offering the opportunity for greater professional study and a greater degree of specialization together with reference and consultation among members of the profession, whether or not associated in partnerships or firms. In turn, this increase both in the ability of persons entering the profession and in the qualifications of the practitioners will tend to check the drift of functions to other, more specialized, occupational groups, and will both merit and receive greater economic remuneration.

Incidentally, the professional qualifications and the economic position of the profession is not a matter of concern only to the independent practitioner. On the contrary, the professional and economic status of the independent practitioner affects the position of every lawyer, be he salaried employee, civil servant, judge or something else. The statistical sources already cited show that the salaries of employed lawyers and doctors have approximately the same relationship to each other as the incomes of the independent practitioners. The salaries of professors in medical schools are notoriously above those of law schools. Examine the civil service salary scale of any state and compare the salaries of doctors and lawyers, and you will find that the disparity discussed here is slavishly followed by the civil service commission. Even in the Armed Forces, doctors, dentists and veterinarians are paid more than lawyers in equivalent positions.[18] Although the American Bar Association is seeking to equalize these pay scales through congressional action, it appears that this disparity is merely symptomatic of a more fundamental ill in the profession. The fact is that the organized legal profession has failed to keep pace with organized medicine in maintaining and raising standards for admission to and practice in the profession. Until this situation is remedied, legislative lobbying for equal pay is, in the long run, doomed to futility.

Undoubtedly lawyers, trained to look at "the other side" and to advocacy in opposition, will find objections to these conclusions and their obvious implications. Minority groups may suspect that any program to raise the standards of admission to the Bar will be used as covert means of discrimination. There is, unquestionably, such a possibility. This needs to be guarded against; and there is no shadow of an excuse for making admission to the practice of law depend upon anything but the personal ability of the individual. Longer periods of scholastic training, imposing greater economic barriers, should be compensated for by more generous scholarship programs for able individuals. The Bar itself must be vigilant that the qualifications for admission—either as they now exist or as they may be in the future—are not applied or used in any manner to discriminate among persons except on the basis of ability. With this caveat, the possibility of discrimination does not appear to be a logical objection to more rigorous professional standards.

Another possible objection is the argument that the legal profession, more than any other, has an important social function to perform in the defense and preservation of our civil liberties. The ready availability of legal services to all is probably an essential condition for the maintenance of civil liberties to all. But it does not follow that a larger number of less competent, less well paid lawyers will furnish a better defense for libertarian causes than a smaller body of more competent, more secure lawyers. As evidence one need only look at the notation of appearances in the great civil liberty cases that now reach the appellate courts. Who takes these cases up today? Is it the professionally or economically marginal lawyer, or the successful, secure practitioner who can afford to donate time, money and effort to such causes? Admittedly no scientific survey has been made of this problem. However, on the basis of a good many years of interest and observation, this writer has reached the conclusion that civil liberties are defended mostly by the more able and successful members of the legal profession, and that they give of their effort in such causes as they are able economically to afford. A somewhat smaller, better qualified and economically more secure professional group might well offer more, rather than less, ardent defense of our liberties in economically unprofitable causes.

Decline in Income . . . A Failure of the Bar

It is my own conclusion, from a study of the available data, that the decline in the relative economic position of the legal profession is merely a symptom of a general failure on the part of the Bar to keep professional standards adjusted to the current needs and economic demands of society. The medical profession has surpassed the legal profession economically because it has continued to maintain and raise its standards so that the chances of the

16. *Income of Physicians*, U. S. Department of Commerce, Survey of Current Business, July, 1951.
17. *Which Field of Practice Is Most Satisfying?* 33 Medical Economics 102 (November, 1956).
18. American Bar News, March 15, 1957, page 3, *House Backs Move To Aid Lawyers in Armed Forces.*

public being served by an incompetent doctor are considerably less today than the chance of being served by an incompetent lawyer. The medical profession has higher standards than the legal profession for admission to professional school, for graduation from professional school, for admission to practice, for continuance in practice and for the handling of difficult and specialized cases in the practice. Within the medical profession itself there is an elaborate system of ethics and regulations (including hospital rules and organizations) which generally prevent a doctor from undertaking a medical task that lies beyond his own competence. The legal profession has not even the beginning of such a system of inhibitions.

If the legal profession is ever to regain a position of economic parity with the medical profession, the organized Bar must undertake a program of drastic revision of professional standards. Such a program probably should start in, and certainly must include, the law schools and the bar examinations. It is futile to expect the schools themselves to undertake such reform. There are many reasons for this. First, it is not the function of a school to act as an administrative agency enforcing prescribed standards; rather its function is to instruct. As anyone who has had a slight experience with the matter can testify, there is nothing more tying together the function of teaching and of testing and grading than the adventitious circumstance of their taking place generally in the same room. The true teacher desires to teach everyone, and has little interest in testing and flunking. This is not his job.

In the second place, all of the other motivations work against the law school as an instrument for raising standards. In state-supported institutions, prestige and often pay are likely to be related to the size of the school, so the motivation of the faculty, consciously or subconsciously, cannot be toward a drastic reduction in size. In addition, there are usually political pressures from the families, relatives and friends of aspirant professionals, which exert a powerful pressure against too rigorous an attitude. With respect to private institutions, the tuition and the number of alumni are the two greatest sources of income, so economically the school is under pressure not to curtail these much.

Finally, standards of admission to law school and to the Bar will be significant only when they are generally effective, at least within any given state. There are, of course, law schools which even now have standards for admission and graduation almost equal to those of some medical schools. But the students unable to get into such law schools have no difficulty in attending others, with lower standards, and then in qualifying for the bar examinations in most of the states. It is not enough that the major law school in a state, or even all the law schools of a given state, should have higher standards. The qualifications for taking the bar examination must also be raised commensurately, so that only those who are able to qualify fully according to the standards prevailing in the best professional schools shall be able to enter the profession.

Beyond establishing considerably higher standards than at present both for admission to law schools and to the practice, the profession must find some method of insisting upon a continuing obligation of competence and qualification for practicing lawyers in their relationship to clients' problems. It would be unethical and a subject for professional discipline if a pediatrician were to attempt brain surgery, a dermatologist were to treat mental illness, an anesthesiologist were to examine eyes for corrective lenses, or any other similar attempt were made by a physician to venture into a field in which he was not qualified. Yet this kind of thing happens every day in the legal profession. Lawyers without any experience or special qualifications will fumble and stumble their way through intricate problems of trial practice and procedure, taxation, antitrust, real property, trademark, administrative procedure, or any of a host of other complex and difficult fields. Nothing in legal ethics or tradition proscribes this; and the economic condition of the profession if it does not compel, at least induces it.

Whether the remedy for this condition is called specialization, post-graduate education, post-admission training or something else is of little importance. It is important, however, that the profession give recognition to the growing complexity and ramifications of the subject matter with which it deals and that it begin to insist not only on higher standards for those who would study law, for legal education and for admission to the Bar, but also for continued practice at the Bar itself. If this is done, the economic status of the profession will improve commensurately, and the legal profession may again rank with the medical profession in skill, status and remuneration.

To put the matter succinctly: Doctors make more money than lawyers because as a professional group they have established and maintained higher standards of competence and qualification. Doctors are more rigorously selected, more thoroughly trained and educated, more highly specialized and more expert in dealing with the problems of their professional practice than lawyers, as a group. Remuneration may not be an end in itself; but it happens to be the mechanism by which our society, as now organized, channels abilities and personnel into various occupations and indicates the degree to which individuals or groups are meeting the demands of society. In simple terms, to get more money we've got to improve the product. The insistence upon more rigorous standards for the selection of law students, the elevation of the standards of legal education and admission to the Bar, and the establishment of adequate standards of professional competence for practicing lawyers—these will inevitably increase the competence of the legal profession, improve the economic position of the professional group, and, most important, serve the public interest by providing better lawyers and better legal service. This is the challenge now facing the organized Bar.

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